No. ____

In The

Supreme Court of the United States

October Term, 1996

MARY ANNA RIVET, MINNA REE WINER, EDMOND G. MIRANNE, and EDMOND G. MIRANNE, JR.,

Petitioners,

versus

REGIONS BANK, WALTER L. BROWN, JR., PERRY S. BROWN, and FOUNTAINBLEAU STORAGE ASSOCIATES,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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91 pp

QUESTIONS PRESENTED

(1) Does this Court's holding in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 396 n. 2, 101 S.Ct. 2424, 2427 n. 2, 69 L.Ed.2d 103 (1981), permit removal of a state court controversy involving mortgage rights in real property, solely on the basis that the defendants intended to assert the affirmative defense of claim preclusion based on a prior federal judgment, where the Petitioners had not filed the prior federal action and had no conceivable claim which might have been brought in federal court?

(2) May a United States District Court reach a decision on the merits of a controversy prior to ascertaining whether federal jurisdiction over the controversy exists, and then use the decision on the merits to justify a decision to invoke jurisdiction over the controversy?

LIST OF PARTIES

The names of all Petitioners who are parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. With respect to the Respondents: Regions Bank of Louisiana is a wholly-owned subsidiary of Regions Financial Corporation. Fountainbleau Storage Associates is a Louisiana Limited Liability Company. Petitioners are unaware of the complete list of its principals. To the best of Petitioners' knowledge and belief, the following persons are among the principals of Fountainbleau Storage Associates:

1. Burnam Storage Associates
2. The Burnam Companies
3. CMC, A Division of Burnam Companies
4. Cris Burnam
5. Tim Burnam
6. Roland von Kurnatowski

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

MAY IT PLEASE THE COURT,

Petitioners, Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr., respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered in this matter on March 13, 1997.

OPINIONS AND JUDGMENTS BELOW

The Opinion and Judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered March 13, 1997, is reported at 108 F.3d 576 (5th Cir. 1997) and is reprinted in the Appendix to this Petition at pages App. 1 through App. 43. The Order and Reasons of the United States District Court for the Eastern District of Louisiana, entered April 20, 1995, are reprinted in the Appendix to this Petition at pages App. 44 through App. 53.

STATEMENT OF JURISDICTION

The judgment of the oral argument at the United States Court of Appeals for the Fifth Circuit was entered on March 13, 1997, affirming the Order and Reasons of the United States District Court for the Eastern District of Louisiana, dated April 20, 1995. A Suggestion of *En Banc* Treatment was denied on April 15, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the following provisions of the United States Code:

Title 28 U.S.C. § 1441:

> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance.

This action was originally filed in the Civil District Court for the Parish of Orleans, State of Louisiana, to seek recognition of a mortgage on real property located in Orleans Parish, and damages for certain property transfers within Orleans Parish that abrogated Petitioners' rights under that mortgage. It was removed to the United States District Court for the Eastern District of Louisiana, pursuant to 28 U.S.C. § 1441(b), on the basis of federal question jurisdiction. All parties are citizens and residents of the State of Louisiana. The essence of this Petition is that there was no basis for federal question jurisdiction or for removal jurisdiction in the District Court.

In her dissent from the Opinion of the Court of Appeals, Judge Edith H. Jones correctly analyzed the provenance of this action as follows:

> This is a state law claim. The only federal element that plaintiffs could have pleaded is an anticipatory defense . . .

App. 39.

Thus, this claim could not have been brought originally in federal court. Both the District Court and the Fifth Circuit constructed a fatally flawed rationale for removal jurisdiction based upon *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 396 n. 2, 101 S.Ct. 2424, 2427 n. 2, 69 L.Ed.2d 103 (1981) (hereinafter referred to as "*Moitie*"). Utilizing this rationale, both lower courts constructed a completely self-referential tautology in which they first made a decision on the merits, *i.e.*, that Petitioners' claims were barred by the preclusive effects of a prior federal judgment, and then based removal jurisdiction in the first instance on that decision on the merits.[1] The District Court could not have exercised jurisdiction over this action in the first instance, and there was thus no basis for removal jurisdiction.

II. Statement of the Facts.

In a complex series of transactions which were all finalized on December 29, 1993, Respondent Regions Bank of Louisiana ("Regions Bank"), which owned certain property rights with respect to a parcel of real property located in Orleans Parish, purchased those rights which it did not own from Respondents Walter L. and Perry S. Brown ("the Browns"), and then sold the entire

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[1] Petitioners maintained below, and continue to maintain in this Court, that their claims are not subject to the preclusive effects of the prior judgment.

fee interest to Respondent Fountainbleau Storage Associates ("FSA").[2] App. 5-6. At the time of the sale, there was a currently valid $5 million collateral mortgage duly recorded and re-inscribed in the name of Petitioners by the Recorder of Mortgages of Orleans Parish. The mortgage encumbered both the underlying leasehold estate and the buildings and other improvements. App. 3-4.

There was no provision made in the sale for the recognition of Petitioners' mortgage, and the various closing documents made no mention of it whatsoever. Louisiana is a "Record Notice" jurisdiction. *McDuffie v. Walker*, 51 So. 100 (La. 1909). On December 29, 1994, Petitioners brought suit in the Civil District Court for the Parish of Orleans seeking recognition of their mortgage and damages for the transfers by Regions Bank in derogation thereof. App. 6.

Regions Bank had first come into possession of its rights in the subject property through a bankruptcy proceeding that was terminated in October of 1986. App. 4-6. Prior to that time, the subject property had numerous liens and encumbrances against it, including a $15 million first mortgage in the name of Regions Bank and Petitioners' mortgage, which was at that time a second or junior encumbrance. *Id.* During July and August of 1986, the bankruptcy trustee sought and was granted approval by the Bankruptcy Court for the Eastern District of Louisiana to sell the subject property. App. 4-5. At the ensuing auction sale, Regions Bank used its first mortgage to "credit bid" and bought the buildings and improvements and the leasehold estate. The underlying land was not

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[2] Regions Bank is the successor corporate entity to both First Financial Bank, FSB, and SECOR Bank. In the interest of clarity, Regions Bank and all its various corporate predecessors will be referred to by that single name.

subject to the bankruptcy sale and was owned by the Browns until Regions Bank bought it from them in December, 1993. App. 5-6.

The order authorizing the sale by the trustee purported to authorize that the property be sold "free and clear of all liens and encumbrances". It is undisputed, however, that no adversary proceeding was held pursuant to Rule 7001 of the Federal Rules of Bankruptcy Procedure, as is mandated by the Bankruptcy Code before a lien such as Petitioners' mortgage may be cancelled. App. 21-23. The only proceeding which was held with respect to this order was a motion hearing of a type which has consistently been held to be insufficient to cancel a lien or other encumbrance. Thus, as a matter of law, Regions Bank bought the property "subject to" Petitioners' mortgage. *In re Parrish*, 171 B.R. 138, 141 (Bkrtcy.M.D.Fla. 1994); *In re Wing*, 63 B.R. 83, 85 (Bkrtcy.M.D.Fla. 1986).

Regions Bank maintained below that Petitioners were barred by *res judicata* from challenging the ultimate District Court judgment that terminated the bankruptcy proceeding in October, 1986. App. 7. Regions also maintained that the motion hearing in the Bankruptcy Court and the resulting order were effective to extinguish Petitioners' mortgage, despite the lack of authorization for such a procedure in the Bankruptcy Code. App. *Id.*

Despite this claim, however, over the course of almost eleven years, Regions Bank has failed to procure the cancellation of Petitioners' mortgage on the mortgage rolls of Orleans Parish, and has proffered no explanation for this failure. App. 5. Neither did Regions Bank seek to renew the bankruptcy judgment which lapsed in 1996. Regions Bank's own first mortgage was never re-inscribed, expired under the applicable statute of limitations in September of 1993, and was duly removed from

the mortgage rolls by the Recorder of Mortgages. App. 5-6. In fact, Regions Bank's mortgage was actually extinguished by operation of law in 1986, pursuant to the Louisiana doctrine of confusion, when Regions became the holder of both the mortgage and the subject property. Thus, at the time this action was commenced, Petitioners' mortgage was the only encumbrance duly recorded against the subject property. App. 5-6 & n. 7.

Both the District Court and the Fifth Circuit sustained Regions Bank's claim of preclusion based upon the bankruptcy order and resulting District Court judgment. App. 44-53. Petitioners maintained that preclusion did not apply for two reasons: First, the cause of action sued upon was not the same as that giving rise to the bankruptcy proceeding. The essential facts establishing the cause of action sued upon were the recorded existence of the mortgage – which had been affirmatively reinscribed by the Recorder of Mortgages at the request of Petitioners in 1994[3] – and the sale in derogation of the mortgage in 1993, all of which occurred after the entry of the bankruptcy judgment, and none of which was involved in the bankruptcy proceeding. App. 6-7.

Second, Petitioners were not parties to the bankruptcy action. Two Petitioners (the Mirannes) appeared in the bankruptcy proceeding as creditors of the bankrupt estate, but were never named as parties thereto, and it is undisputed that no adversary proceeding was held in which they could have formally contested the cancellation of their mortgage as required by the bankruptcy rules. App. 4-5. Even if this were enough to make those two Petitioners parties to that action for purposes of

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[3] The mortgage note, which the mortgage secured, was duly reinstated by the maker, and prescription thus waived, in favor of Petitioners in 1989 and 1994.

preclusion, the Bankruptcy Court had no power under the Bankruptcy Code to cancel the mortgage without an adversary proceeding, and thus, the cancellation of the mortgage was not properly a part of the resulting judgment. The other two Petitioners (Rivet and Winer) were and remain the spouses of the Mirannes, but they did not appear in the bankruptcy proceeding in any capacity and were not represented by counsel. App. 19-20.

III. Course of proceedings and disposition in the Court below.

Suit was commenced on December 29, 1994, in the Civil District Court for the Parish of Orleans. The Removal Petition was filed on February 3, 1995, by Counsel for Respondent FSA. On or about February 27, 1995, Respondent Regions Bank made a Motion for Summary Judgment. On or about March 3, 1995, the Browns made a similar Motion for Summary Judgment, and on March 21, 1995, FSA filed its Motion for Summary Judgment. All three Motions were submitted without oral argument on April 5, 1995.

On March 6, 1995, Petitioners made a Motion to Remand which was also submitted without oral argument on April 5, 1995. On April 21, 1995, the District Court denied Petitioners' Motion to Remand and granted Respondents' Motions for Summary Judgment. The District Court's Order and Reasons (hereinafter "the District Court Opinion"), was signed by the Court on April 20, 1995 and entered by the Clerk of Court on April 21, 1995. App. 44-53. The Judgment ordering dismissal of the entire action was signed on April 25, 1995, and entered by the Clerk of Court on April 27, 1995. On May 19, Petitioners filed a timely Notice of Appeal from both the Order and Reasons and the Judgment ordering dismissal.

Briefing in the Court of Appeals was complete on October 19, 1995, and oral argument was had on October 2, 1996. The Court of Appeals affirmed the District Court in a two-to-one panel decision dated March 13, 1997. App. 1-36. Judge Edith H. Jones filed a dissenting opinion. App. 36-43. Petitioners' subsequent Suggestion of *En Banc* Treatment was denied without opinion on April 15, 1997. This Petition for a Writ of Certiorari was timely filed in this Court on June 11, 1997.

Both the District Court and the appellate panel made a determination on the merits before they had determined the existence of either removal jurisdiction or federal subject matter jurisdiction. Both lower courts then used this determination on the merits as the sole basis for federal jurisdiction. Because there was no federal jurisdiction over this exclusively state-law cause of action, both lower courts lacked the basic power to hold that Petitioners' claims were barred by the preclusive effects of the prior order of the Bankruptcy Court.

This basic lack of jurisdiction is the sole issue that Petitioners seek to place before this Court. Because of the circular reasoning of both lower courts, however, certain peripheral issues appear at first blush to assume greater importance than is in fact the case.

Perhaps most obvious is the issue of the existence of the mortgage. In the first instance, it is indisputably a matter of state law whether or not a mortgage exists on real property located in that state. And, by the clear mandate of this Court, it is also for the state court to ascertain and apply the preclusive effects of prior federal judgments. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684, 1691, 100 L.Ed.2d 127 (1988); *Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511, 518, 75 S.Ct. 452, 456-457, 99 L.Ed.2d 600 (1955). On the instant facts, however, it is undisputed that Respondents did not in

fact procure the cancellation of Petitioners' mortgage, whether or not the bankruptcy judgment gave them the right so to do, and that the judgment has now lapsed. Because of the basic lack of removal jurisdiction, however, this issue should not have been before the lower courts, and is not properly before this Court.

The jurisdictional formulation of the lower courts is simply that if a case filed in state court is "completely precluded" by a prior federal judgment, then for that reason alone, the District Court has removal jurisdiction, no matter what the nature of the cause of action is. As Judge Jones put it in her dissent:

> The majority essentially holds that *a conceivable federal claim is not necessary for removal*, as long as there is a federal defense of *res judicata* based on a federal judgment.

App. 41 (Emphasis in original).

Put succinctly, the validity of this formulation is the basic issue raised by this Petition, and its reversal would be completely determinative of jurisdiction. Among other things, Petitioners maintain that even if the preclusion decision were "correct", this would still not have conferred removal jurisdiction. Preclusion or *res judicata* is indisputably an affirmative defense, and thus cannot be a part of Petitioners' claim. Fed.R.Civ.P. 8(c). Moreover, a holding that a claim is precluded is also indisputably a determination on the merits which the District Court must make after, and not before, it has accepted jurisdiction. *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939, 946 (1946). *See also Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912, 917 (1951).

Thus, the lower courts' holdings that Petitioners' claims were "completely precluded" were also not properly before those courts, and are not properly before this

Court, because of the lack of removal jurisdiction. Nevertheless, Petitioners maintain that the substance of the determination that their claims were precluded was also in error. Thus, even if the lower courts' tautological jurisdictional formulation was proper, there was still no jurisdiction because there was no preclusion. However, because Petitioners maintain that this determination has not properly been placed before a federal court for decision, and in the interest of brevity, this point will be addressed only briefly in this Petition.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. Summary of Argument.

There was no basis for either removal jurisdiction or federal subject matter jurisdiction over this action in the District Court. Thus, the decisions of both lower courts lack any jurisdictional basis and must not be allowed to stand. A correct result could be reached in this case with a summary reversal and an order of remand to the state court. There are several reasons, however, why this Court should address the jurisdictional issues presented by this Petition.

The sole precedential basis for both decisions below was footnote 2 of this Court's *Moitie* opinion. Both the *Rivet* opinion by the Fifth Circuit, and indeed the *Moitie* footnote itself, stand in direct contradiction to every other jurisdictional precedent of this Court for at least the last sixteen years. Moreover, because this Court has reaffirmed the basic principles of removal jurisdiction in at least three major opinions subsequent to *Moitie*, and in such a way as to negate the implications of footnote 2, Petitioners respectfully submit that *Moitie*, at least with respect to footnote 2, has been overruled *sub silentio*, and thus should not be allowed to continue to confuse the

otherwise clear principles of removal jurisdiction articulated by this Court.

In addition, the particular jurisdictional formulation that the Fifth Circuit has constructed, based ostensibly on *Moitie*, violates the most basic rules of jurisdiction, and as such is directly contrary to other controlling precedent of this Court. The *Rivet* formulation permits removal jurisdiction in an instance in which the action could not have been brought originally in federal court because there was no conceivable federal claim presented by the facts. The *Rivet* formulation permits removal jurisdiction to be based on an affirmative defense. The *Rivet* formulation violates this Court's rule that state courts are presumed competent to interpret and apply federal law, including most pointedly the preclusive effects of federal judgments.

In addition, the *Rivet* formulation requires the District Court to reach a determination on the merits at the outset, and then use that determination on the merits as a basis for jurisdiction. This violates what is arguably the most basic rule of jurisdiction: that a court may not take any action to affect the merits of a case until it has first found that it has jurisdiction.

The *Rivet* formulation allows a District Court to order that a case be removed from a state court where that case has no essential federal character whatsoever. Specifically, the direct implication of the *Rivet* formulation is that a suit between citizens of the forum state, to enforce a mortgage on real property located in the forum state, is essentially federal in character merely because the defendant has an arguably effective affirmative defense based upon a prior federal bankruptcy order, even where the judgment resulting from the order has lapsed and was never actually used to cancel the mortgage in question.

This is a gross imposition of naked federal authority on the sovereignty of state courts.

The *Rivet* formulation in reality has no precedential basis whatsoever. There is not one single reported opinion that actually supports the *Rivet* formulation. The *Rivet* opinion purports to rest its formulation on *Moitie* and on a previous interpretation of *Moitie* by the Fifth Circuit. As the *Rivet* dissent points out, however, the facts at bar do not fit under the facts at bar in *Moitie*, and the previous Fifth Circuit opinion took great pains to limit its interpretation of *Moitie* strictly to the facts of that case. App. 40-42. Moreover, the Ninth Circuit, whence *Moitie* arose and the only circuit to have addressed *Moitie* in any meaningful way, would also limit *Moitie* to its facts, and thus impose a specific limitation on the *Moitie* footnote which would not cover the situation at bar. App. 37-38 & n. 3. Thus, not only is *Rivet sui generis*, but Petitioners would respectfully submit that it also removes virtually any limitation to the naked assertion of federal power over a state court, where the defendant merely intends to assert an affirmative defense based on federal law.

Finally, even if the specific *Rivet* formulation were to be countenanced, the irony is that there still should not be removal jurisdiction, even under the formulation, because the requirements of claim preclusion are not met, and thus Petitioners' claims were not "completely precluded". The cause of action sued upon was demonstrably not the same as that in the earlier federal bankruptcy proceeding, and this is obvious as a matter of law. In addition, two of the Petitioners should not be held to have been parties to the bankruptcy proceeding even though they appeared as creditors of the bankrupt estate. And, in order to hold that the other two petitioners were parties to the bankruptcy proceeding – even though they did not appear in that proceeding in any form – the Fifth

Circuit relies exclusively upon the determination of a fact not in the record of this case, *i.e*, that there was no separate property agreement between the respective sets of spouses. App. 19-20 & nn. 48, 49.[4]

For all these reasons, this Court should allow this Petition and issue a Writ of Certiorari. The *Rivet* formulation should not be allowed to stand in direct and flagrant contradiction to the clear precedent of this Court. The necessity for this Court to address the issues in *Rivet* is expressed most pointedly in Judge Jones' dissent:

> Any reader who has followed the majority opinion and this dissent thus far ought to appreciate that our dispute, while technical, is not trivial. The principles of limited federal court jurisdiction and the relative clarity of jurisdictional rules are at issue. *Moitie* and *Carpenter* can be read to authorize removal of this state-law-based case *simply because it is subject to a federal preclusion defense*. But to do so, as I have shown, intrudes on the scope of the well-pleaded complaint rule, expanding removal jurisdiction while engendering complexity and uncertainty in the future. I do not believe such results were intended by the Supreme Court in *Moitie* or by the *Carpenter* panel . . .

App. 42-43 (Emphasis added and footnote omitted).

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[4] The issue of community property/separate property was not raised in or by the District Court, and was not a part of the briefing in the Court of Appeals. Thus, Petitioners Rivet and Winer were never afforded the opportunity to demonstrate that they had in fact entered into separate property agreements with their spouses. In addition the opinion's unsupported and puzzling statement that Petitioners' "subsequent state court complaint listed only the husbands as owners of the collateral mortgage note . . . " (App. 20) is unattributed in the opinion and has no support whatsoever in the record.

II. The opinion below is directly contrary to controlling precedent of this Court.

In *Rivet*, the Fifth Circuit affirmed the District Court's reasoning that an essentially state-law cause of action may be removed to federal court if the defendant in state court intends to assert the affirmative defense of claim preclusion or *res judicata*, and the federal court finds, in a decision on the merits, that the defense would be effective. Relying on *Carpenter v. Wichita Falls Independent School District*, 44 F.3d 362 (5th Cir. 1995) (hereinafter "*Carpenter*"), the *Rivet* panel reasoned as follows:

> In thus clearly setting forth the rule for this circuit, the *Carpenter* panel concluded by stating that:
>
> "[w]e *hold* that *Moitie* should apply only where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law."
>
> . . . we conclude that the district court properly reasoned that *Carpenter*'s holding provides the sole framework for analyzing the jurisdictional issues raised [herein] . . . and just as the district court here found, *Carpenter* controls. Accordingly, if the defendants can show that [Appellant]'s state court suit . . . is in fact barred by the claim preclusive effects of the [prior federal judgment], then the district court's denial of the . . . motion to remand, and its dismissal of the suit for essentially the same reason, must be affirmed.

App. 17-18. (Emphasis by the Court and Footnote omitted).

In addition, though it does not appear to bear on the actual holding, as set forth above, the *Rivet* opinion also

discusses the "artful pleading" exception to the well-pleaded complaint rule. Again relying on *Carpenter*, the opinion states as follows:

> The common rationale for these jurisprudential exceptions – euphemistically known by the cynically sarcastic sobriquet of the "artful pleading exception" – is that when the plaintiff has available *"no legitimate or viable state cause of action", but only a federal claim*, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law."

App. 9-10 (Emphasis added and Footnotes omitted).

According to the *Rivet* Panel, *Carpenter*'s and *Moitie*'s notion that removal jurisdiction is conferred by a state-court defendant's assertion of an apparently-effective affirmative defense of claim preclusion, is but a "rarer specie [*sic*] of artful pleading". App. 11. By this rationale, the Panel has in essence held that a state-court suit to enforce a mortgage *via ordinaria*, on land located in, and between residents of, the forum state, and with no other connection to federal law than the presumed affirmative defense, is "essentially federal" in character. App. 37-38, 39.

At the outset, there are at least three points which are absolutely clear under this Court's precedent, and with respect to which the *Rivet* holding is in direct violation of that precedent. First, this is not a case of "artful pleading". As Judge Jones points out in her dissent:

> . . . what we also do not have in this case, but [which] was essential in *Moitie* and obviously present in *Carpenter*: a conceivable federal claim that could be asserted by the plaintiff. . . . *To say that a plaintiff's claim can be removed to federal court when he has alleged no conceivable federal claim is true mockery of the well-pleaded complaint rule and the artful pleading doctrine*. How can the

> artful pleading doctrine apply if the plaintiff's claims cannot be recharacterized into an essentially federal claim that has been omitted by artful pleading?

App. 41 (Emphasis added and citation omitted).

As this Court has made plain, the artful pleading doctrine does not convert legitimate state claims into federal ones, but rather reveals the suit's "necessary federal character". *See Franchise Tax Board of California v.Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 23, 103 S.Ct. 2841, 2854, 77 L.Ed.2d 420 (1983) (hereinafter referred to as *"Franchise Tax Board"*). To say that a state-court suit to enforce a mortgage is "either wholly federal or nothing at all" or that such a plaintiff "necessarily is stating a federal cause of action whether he chooses to articulate it that way or not" is a direct violation of *Franchise Tax Board*. *See Carpenter v. Wichita Falls Independent School District*, 44 F.3d 362, 366 (5th Cir. 1995), *quoting*, 14A Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3722 (2d ed. 1985).

Perhaps the most basic and fundamental principle of the law of removal jurisdiction is that an action filed in state court may not be removed to federal court unless that action could have been brought originally in federal court. *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 840-841, 109 S.Ct. 1519, 1521, 103 L.Ed.2d 924 (1989) (hereinafter referred to as *"Oklahoma Tax Commission"*). Because this state-law mortgage action could not conceivably have been brought originally in federal court, there can be no removal jurisdiction. Perhaps the most pointed comment from the recent jurisprudence to this effect is found in *Rains v. Criterion Systems, Inc.*, 80 F.3d 339 (9th Cir. 1996):

> The claim was authorized by state law and no essential federal law was omitted. The artful pleading doctrine does not permit defendants to

> achieve what they are trying to accomplish here: to rewrite a plaintiff's properly pleaded claim in order to remove it to federal court.

80 F.3d at 344.

Second, Fed.R.Civ.P. 8(c) expressly declares claim preclusion or *res judicata* (as well as discharge in bankruptcy) to be an affirmative defense. *See American Casualty Co. v. United Southern Bank*, 950 F.2d 250, 253 (5th Cir. 1992). The *Rivet* opinion does not cite a single precedent or present a single argument as to why Rule 8(c)'s clear command should be ignored in this case. This Court's precedent is both clear and well-settled: Removal jurisdiction is not conferred where the federal right is to be raised as a defense to a cause of action under state law. *Oklahoma Tax Commission*, 489 U.S. at 840-841, 109 S.Ct. at 1521. This is so even where the determination of the federal right or immunity either is or may be dispositive of the case. *Franchise Tax Board*, 463 U.S. at 13, 103 S.Ct. at 2848; *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 396-398, 107 S.Ct. 2425, 2431-2433, 96 L.Ed.2d 318 (1987) (hereinafter referred to as *"Caterpillar, Inc."*); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). *See also Arkansas v. Kansas & Texas Coal Co.*, 183 U.S. 185, 188, 22 S.Ct. 47, 48, 46 L.Ed. 144 (1901) (*"jurisdiction is not conferred* by allegations that defendant intends to assert a defense based on . . . a law . . . of the United States.") (Emphasis added).

Third, the *Rivet* opinion's unarticulated rationale for its decision appears to be to prevent Petitioners from engaging in a "collateral attack" on the earlier federal judgment. *See, e.g.*, App. 17-18, 31-32. Quite obviously, Petitioners do not view their cause of action in this light. Nevertheless, even if this were a completely fair characterization of this case, that would still not confer removal jurisdiction. Once again, this Court has made it clear that:

> . . . when a state proceeding presents a federal issue, *even a pre-emption issue*, the proper course is to seek resolution of that issue by the state court. . . . [Appellees] must present their [claim preclusion] argument to the [Louisiana] state courts, *which are presumed competent to resolve federal issues.*

Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 108 S.Ct. 1684, 1691, 100 L.Ed.2d 127 (1988); *Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511, 518, 75 S.Ct. 452, 456-457, 99 L.Ed.2d 600 (1955).

In short, Respondents' proper course of action was to have presented their affirmative defense based upon claim preclusion to the Louisiana State Court. Based upon the violation of precedent discussed in this section alone, the *Rivet* opinion should not be allowed to stand as it is, in such direct and flagrant contradiction to the clear precedent of this Court.

III. The opinion below makes a determination on the merits before it has accepted jurisdiction.

Perhaps the most crucial way in which the *Rivet* opinion is flawed is that the opinion, as well as the *Carpenter dicta*, does fundamental violence to the most basic analytical framework of all federal subject matter jurisdiction, including removal jurisdiction. The most basic principle of subject matter jurisdiction is that the determination of the existence of jurisdiction must be made first, and if jurisdiction does not exist – as it does not in this case – no further action may be taken that will affect the merits of the claim. *See Holy Cross College v. Louisiana High School Athletic Ass'n*, 632 F.2d 1287, 1289 (5th Cir. 1980), *quoting Spector v. L. Q. Motor Inns, Inc.*, 517 F.2d 278, 281 (5th Cir. 1975) (A district Court's " . . . jurisdictional inquiry is 'limited to observing whether the

complaint is drawn to seek recovery under a federal statute . . . ' ").

Moreover, it is well-settled that:

> *Summary Judgment is a judgment on the merits;* it has the same effect as if the case had been tried by the party against whom judgment is rendered and decided against him.

Daigle v. Opelousas Health Care, Inc., 774 F.2d 1344, 1348 (5th Cir. 1985) (Rubin, J.) (Emphasis added). And, as this Court has held unequivocally:

> Whether the complaint states a cause of action on which relief could be granted is a question of law and *just as issues of fact it must be decided after and not before the court has assumed jurisdiction.*

Bell v. Hood, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939, 946 (1946). This case dealt with a motion to dismiss for failure to state a claim, and thus its admonition that a decision on the merits may be made *only "after and not before"* jurisdiction has been accepted is even stronger with respect to a motion for summary judgment. *See also Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 249, 71 S.Ct. 692, 694, 95 L.Ed. 912, 917 (1951).

The *Rivet* opinion, however, sets up an analytical framework where a decision on the merits (complete preclusion) is made first, and then that decision on the merits is used as the sole basis for the Court's jurisdiction to reach a decision on the merits. This analytical framework is a completely self-referential tautology. In other words, the Court has no jurisdiction to decide the merits until it decides the merits which decision gives it jurisdiction to decide the merits in the first place. Within the framework of jurisdictional analysis, this is a virtually open-ended expansion of federal jurisdiction.

This analytical flaw is clear from even a cursory reading of the *Rivet* opinion. The first half of the opinion (App. 1-18) determines that removal jurisdiction will exist *if* a state-court action is "completely precluded". But, it is not until the second half of the opinion (App. 18-36), *when the Court is considering the merits of the case pursuant to a motion for summary judgment*, that the opinion concludes that the Court does indeed possess jurisdiction because the case is "completely precluded".

The foregoing analysis leads to only two possible conclusions: (1) *Carpenter*'s and the *Rivet* Panel's interpretations of the *Moitie* footnote are incorrect; and/or (2) The *Moitie* footnote has been overruled, *sub silentio*, by *Franchise Tax Board*, *Oklahoma Tax Commission*, and/or *Caterpillar, Inc.* Petitioners respectfully suggest that the second analytical alternative is the more correct reading of this Court's precedent.

IV. An expansive reading of the *Moitie* footnote has been implicitly disavowed by this Court.

The *Rivet* Panel found that this case was controlled by the Fifth Circuit's earlier decision in *Carpenter*. The point at issue in *Carpenter* was the interpretation of the famous "enigmatic footnote" in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 396 n. 2, 101 S.Ct. 2424, 2427 n. 2, 69 L.Ed.2d 103 (1981). *Carpenter*, 44 F.3d at 368-369, 370-371. If the *Rivet* Panel's interpretation of *Carpenter*'s interpretation of the *Moitie* footnote is the correct one, then that aspect of *Moitie* has been overruled *sub silentio* by this Court's controlling precedent, and both *Carpenter* and *Rivet* are in violation of that precedent in several particulars, as discussed in the preceding sections.

Moitie was decided in 1981. Less than two years later, in 1983, in *Franchise Tax Board*, the Supreme Court *unanimously* reaffirmed every major principle of removal jurisdiction under 28 U.S.C. § 1441(b) without mentioning, citing, or in any way clarifying the controversial footnote. Moreover, Justice Brennan, the author of *Franchise Tax Board*, had expressly dissented from the *Moitie* footnote, and the author of *Moitie*, Justice Rehnquist, joined the later opinion. As demonstrated above, *Carpenter*'s and *Rivet*'s interpretations of the *Moitie* footnote are simply not consistent with the unambiguous principles laid down in *Franchise Tax Board*. Subsequently, in *Caterpillar, Inc.* (1987) and *Oklahoma Tax Commission* (1989), both of which were also unanimous decisions, Justice Brennan and a *per curiam* Court gave ringing affirmation of certain specific aspects of removal jurisdiction that are in no way consistent with *Moitie*, *Carpenter*, or the *Rivet* decision.

Most particularly, in *Oklahoma Tax Commission*, this Court held that:

> . . . it has long been settled that the existence of a federal [defense] to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense arises under federal law.

489 U.S. at 841, 109 S.Ct. at 1521, *citing*, *Gully v. First National Bank*, 299 U.S. 109, 109 S.Ct. 96, 81 L.Ed. 70 (1936). This is so even where the determination of the federal right or immunity either is or may be dispositive of the case. *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 13, 103 S.Ct. 2841, 2848, 77 L.Ed.2d 420 (1983); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 396-398, 107 S.Ct. 2425, 2431-2433, 96 L.Ed.2d 318 (1987); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). *See also Arkansas v. Kansas & Texas Coal Co.*, 183

U.S. 185, 188, 22 S.Ct. 47, 48, 46 L.Ed. 144 (1901) ("*jurisdiction is not conferred* by allegations that defendant intends to assert a defense based on . . . a law . . . of the United States.")

Similarly, in *Caterpillar, Inc.*, this Court unanimously suggested that the artful pleading doctrine should be strictly limited to cases involving complete preemption of the state cause of action. 482 U.S. at 392, 396 & n. 11, 107 S.Ct. at 2430, 2432 & n. 11. And in 1986, this Court specifically declined, subsequent to *Moitie*, to recognize federal question jurisdiction merely because a state cause of action required the interpretation of a federal statute. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 810, 106 S.Ct. 3229, 92 L.Ed. 650 (1986) (where state cause of action relied on an interpretation of the Federal Food, Drug, and Cosmetic Act, but where there was no federal cause of action for FDCA violations, federal-question jurisdiction was not invoked).

These post-*Moitie* precedents have led at least three scholarly commentators to conclude either that the *Moitie* footnote has been overruled, or that it should be treated merely as an aberration. *See* Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 Hastings L.J. 273, 303-315 (January, 1993) and Stanley Blumenthal, Jr., *Artful Pleading and Removal Jurisdiction*, 35 UCLA L.Rev. 315, 365 (1987) (arguing that *Moitie*'s ruling on the removal issue should be disregarded). Moreover, as the Ragazzo article points out, allowing removal jurisdiction to turn upon claim preclusion affords the defendant two bites at the apple. If the federal court concludes that claim preclusion does not apply, then the same defendant may re-allege that defense in the state court. The federal determination will have no preclusive effect because the federal court will have used it to conclude ultimately that it did not

have subject matter jurisdiction. Ragazzo, *op. cit.* at 311; *see also* Judge Jones dissent, App. 42 n. 7.

Similarly, Rona L. Pietrzak, *Comment, Federated Department Stores v. Moitie: A Radical Departure From Traditional Removal Jurisdiction or an Aberration?*, 43 Univ.Pitt.L.Rev. 1165, 1178 (1982), concludes that this Court did not actually intend to alter the law of removal jurisdiction because the controversial footnote was "striking in its cautiousness". If Professor Pietrzak was correct, that fact has certainly not been perceived by lower federal judges. *Rivet* is not only the latest, but also the most extreme example of the extent to which lower federal courts have felt empowered to expand removal jurisdiction by the *Moitie* footnote.

In this light, Petitioners respectfully submit that the time is ripe, after sixteen years of confusion, for this Court to re-address the *Moitie* footnote and either overrule it directly or at least clarify it so as to clarify the law of removal jurisdiction. The current situation has led to a veritable quandary in the district courts when trying to apply *Moitie* in the removal context. This quandary may perhaps best be seen in two particular district court cases. In *Magic Chef, Inc. v. International Molders Union*, 581 F.Supp. 772, 776 n. 4 (E.D.Tenn. 1983), the Eastern District of Tennessee found that *Moitie*'s value as authority regarding removal jurisdiction was "supersede[d]" by this Court's opinion in *Franchise Tax Board*, which, as noted, was written by Justice Brennan, a vocal dissenter in *Moitie*, and which does not cite *Moitie* at all. In *Gold v. Blinder Robinson & Co.*, 580 F.Supp. 50, 53 (S.D.N.Y. 1984), the Southern District of New York found that:

> Although it is perhaps impossible intellectually to reconcile *Moitie* with established law, it seems proper, absent more direct and fuller consideration of the issue by the court, to view the result as an aberration. . . . "

Finally, the proposition that the *Moitie* footnote needs to be re-addressed and clarified can be seen even more clearly from the range of expansive opinions from the several Circuit Courts of Appeal. This will be discussed in the next and concluding section.

V. The opinion below has no precedential basis in any other reported opinion.

Through an analysis of Circuit Court attempts to grapple with the *Moitie* footnote over the past sixteen years, one may discern the analytical quandary into which this footnote has thrown the jurisprudence of removal jurisdiction, with particular respect to the well-pleaded complaint rule and the artful-pleading doctrine. With *Rivet's* formulation, and the resulting rule of decision – that a state court mortgage action may be removed even where there is no conceivable federal claim that could have been articulated by the state court plaintiffs – Petitioners respectfully submit that the law of removal jurisdiction has reached an analytical nadir, the bottom of the proverbial "slippery slope". At an absolute minimum, as Judge Jones points out in her dissent, "the majority has cited no case", and Petitioners have found no case, "where *Moitie* removal has been allowed where the [state court] plaintiff had not [himself] brought a prior suit grounded in federal law". App. 37 n. 3.

As noted, *supra*, the *Rivet* majority felt that it was bound by the Fifth Circuit's prior ruling in the *Carpenter* case. App. 17-18. Petitioners argued below that much, if not most, of *Carpenter's* discussion of *Moitie* was *dicta* since that case actually found that removal jurisdiction did not exist and remanded Mrs. Carpenter's action to the Texas State Court. App. 17-18; 44 F.3d at 370-371. Judge Jones agreed with this analysis of *Carpenter*. App. at 36-37. At an absolute minimum, however, it cannot be

denied that the preordinating basis of the *Carpenter* opinion's treatment of *Moitie* was to limit the application of footnote 2 to the facts of *Moitie*. The Court said:

> *Moitie* is a *res judicata* case, not a removal case. The decision centered on the Ninth Circuit's creation of a novel exception to the rule of *res judicata*, an issue the [Supreme] Court was evidently eager to reach. Furthermore, the marginal treatment of the removal issue makes us hesitate to expand *Moitie* beyond its facts, for a broad interpretation would counter principles established long before, and reaffirmed after, footnote 2 was written.

44 F.3d at 369 (Footnote omitted).

Again at a minimum, it cannot be denied that the facts at bar do not square with the facts of *Moitie*. Here, Petitioners did not file the prior federal action relied upon for its preclusive effects (App. 4-5, 7), and they have no "conceivable federal claim" based upon the cause of action as alleged. App. 41. In *Moitie*, plaintiffs had filed and lost the prior antitrust claim in federal court, and had simply refiled the same factual allegations under a state antitrust statute. 452 U.S. at 395-397, 101 S.Ct. at 2426-2427. Again, as Judge Jones put it:

> In every respect, [the *Rivet*] characteristics represent a more complex procedural scenario than did the *Moitie* plaintiff's copycat pleadings in federal and then state court.

App. at 39.

Indeed, the very fact that the *Rivet* majority can purport to feel bound by the holdings in *Carpenter* and *Moitie* and then proceed to fashion a holding so far beyond the facts of either case, is almost perfectly illustrative of the analytical quandary in which the Circuit Courts of Appeals have found themselves in attempting to apply

the *Moitie* footnote to the otherwise crystal clear jurisprudence of removal jurisdiction. This analytical quandary is also very well illustrated by the colloquy between the *Rivet* majority (App. 30-32) and Judge Jones in dissent (App. 37-38 & nn. 3, 4, & 5) with respect to the proper analysis of *Moitie* as well as prior precedent from other circuits.

What follows is an analysis of selected Circuit Court cases applying the *Moitie* footnote. When reviewing this analysis, there are three points that should be borne in mind: (1) Not a single case has allowed *Moitie* removal where, as here, the state court plaintiff did not himself file the prior federal action which was relied upon for its preclusive effects. (2) The analytical formulation of every one of these cases – at least where removal was allowed – is in violation of this Court's precedents with respect to removal jurisdiction in either *Franchise Tax Board, Oklahoma Tax Commission,* and/or *Caterpillar, Inc.* (3) Every one of these cases is also in violation of this Court's command in *Chick Kam Choo* that state courts are "presumed competent" to ascertain and apply the preclusive effects of a prior federal judgment. 108 S.Ct. at 1691. If nothing else, the utterly basic need for respect for this Court's precedents requires that the *Moitie* footnote be readdressed at this time and either overruled explicitly or clarified.

Perhaps the most interesting wrinkle in *Moitie* analysis begins with two early Ninth Circuit cases, the Circuit whence *Moitie* itself arose. First, in the year after *Moitie* was decided by this Court, the Ninth Circuit had its first occasion to apply footnote 2 in the context of removal jurisdiction. In *Salveson v. Western States Bankcard Ass'n,* 731 F.2d 1423, 1427 (9th Cir. 1984), the Court was confronted with facts virtually identical to *Moitie* and held that in order to fall within the meaning of footnote 2, the

subsequent state claim must be "merely the same . . . in disguise." Three years later, in *Sullivan v. First Affiliated Securities, Inc.,* 813 F.2d 1368 (9th Cir.), *cert. denied,* 484 U.S. 850, 108 S.Ct. 150, 98 L.Ed.2d 106 (1987), the same Court was confronted with facts more akin to those in *Carpenter* where a single plaintiff filed simultaneous actions in federal and state courts.

The *Sullivan* opinion presaged *Carpenter* and reached the correct result on those facts by ordering remand of the state action to state court. 813 F.2d at 1377. The analytical problem with *Sullivan,* however, was that in *dicta* the Court went so far as to suggest, in so many words, that *Moitie* removal could be justified on the basis of an affirmative defense if that defense was based upon the complete preclusion of the state action by the *res judicata* effects of a prior federal judgment. Relying upon *Salveson,* the Court speculated that:

> A less expansive explanation for *Moitie*'s use of the artful pleading doctrine is that *Moitie* permits removal only if a federal *res judicata* defense is present.

813 F.2d at 1375.

Perhaps the most interesting thing about the *Sullivan dicta* is that the case was decided on April 20, 1987. 813 F.2d at 1368. Less that two months later on June 9, 1987, this Court handed down *Caterpillar, Inc.,* 482 U.S. at 386, 107 S.Ct. at 2425, in which it was made absolutely clear that a federal affirmative defense will not confer removal jurisdiction. 482 U.S. at 396-398, 107 S.Ct. at 2431-2433. Moreover, the *Caterpillar* opinion, which was for a unanimous Court, quoted as authority from Justice Brennan's dissent in *Moitie* itself, where he strongly suggested that the artful pleading doctrine should be confined to "areas of the law pre-empted by federal substantive law". *Id.* at 2432 n. 11, *quoting, Moitie,* 452 U.S. at 410 n. 6, 101 S.Ct. 2433-2424 n. 6.

From the foregoing, it would appear obvious to Petitioners that this Court did indeed eviscerate the *Moitie* footnote, at least insofar as it purports to grant removal jurisdiction on the basis of an affirmative defense based on federal law other than pre-emption. However, this does not appear to be so obvious among the Federal Circuits. For example, both *Carpenter* (44 F.3d at 370 n. 12) and *Rivet* (App. 14-15.) cite *Sullivan* and take at least a substantial portion of their authority from the *Sullivan dicta* discussed above. Similarly, in 1990, the Ninth Circuit again allowed *Moitie* removal based upon an affirmative defense. *Ultramar America Limited v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir. 1990).

The facts of *Ultramar*, however, did at least present an instance where the state-court plaintiff had himself filed the prior federal action, as Judge Jones points out. App. 37 n. 3. But, as Judge Jones also points out, the *Rivet* "majority implicitly acknowledges that while it is not 'constrain[ed]' from allowing *Moitie* removal where the plaintiff has not brought a prior claim, it is broadening the scope of *Moitie* removal beyond what has been allowed in other circuits." *Id*. Petitioners respectfully submit that it is difficult to imagine an extension of the *Moitie* footnote very much beyond where *Rivet* has taken it. As noted, all of the other cases where *Moitie* removal was allowed involved factual situations where the plaintiff had brought the prior action. Nevertheless, the analysis in most, if not all, of these cases is broad enough to take *Moitie* removal to the limits of *Rivet* and beyond.

In *Travelers Indemnity Co. v. Sakrisian*, 794 F.2d 754, 760-761 (2nd Cir.), *cert. denied*, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986), for example, the Second Circuit reasoned that *Moitie* removal would be permitted in fact patterns similar to *Sullivan* and *Carpenter* where a plaintiff files simultaneous actions in federal and state courts.

This analysis is obviously beyond that of both *Sullivan* and *Carpenter*, and leaves the door open to take the analysis even beyond *Rivet* to situations where there is no prior federal judgment. For a collection of cases evidencing the expansive rationales assigned to *Moitie* among the several Circuits, the attention of the Court is respectively directed to footnotes 35 and 36 of the *Rivet* opinion. App. 15, nn. 35 & 36. For a discussion of the very much more limited rationales of the cases upon which the *Moitie* footnote itself relied, the attention of the Court is respectfully directed to footnote 5 of Judge Jones' dissent. App. 38, n. 5.

The analytical quagmire described herein virtually cries out for redress. In effect, based upon the *Moitie* footnote, the several Circuits have developed various rationales for the expansion of removal jurisdiction far beyond, and in direct contravention to, the clear and limited principles of removal jurisdiction articulated by this Court in *Franchise Tax Board, Oklahoma Tax Commission, Caterpillar, Inc.*, and other cases. This flies directly in the face of this Court's command in *Chick Kam Choo* that state courts must apply federal preclusion law. This trend not only confuses and cheapens the law of removal jurisdiction but also runs directly contrary to this Court's narrow and jealously guarded limitations on all federal jurisdiction in general. For a comprehensive analysis of this Court's sixty to seventy year trend of limiting and narrowing the jurisdictional access to federal courts in general, the attention of the Court is respectfully directed to Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 Wake Forest L.Rev. 927 (1996).

CONCLUSION

For the reasons set forth herein, a Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

Mary Anna RIVET, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr., Plaintiffs-Appellants,

v.

REGIONS BANK OF LOUISIANA, F.S.B., Walter L. Brown, Jr., Perry S. Brown, and Fountainbleau Storage Associates, Defendants-Appellees.

No. 95-30524.

United States Court of Appeals,

Fifth Circuit.

March 13, 1997.

Holders of second mortgage on Chapter 7 debtor's leasehold estate brought state court action against successors-in-interest of bank that had purchased leasehold at auction and original lessors' successors-in-interest, to enforce their interest in property. Defendants removed case to federal district court, asserting federal question jurisdiction on theory that prior bankruptcy court orders expressly extinguished holders' rights under second mortgage, and moved for summary judgment. Holders sought remand. The United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., 1995 WL 237019, denied motion to remand, and granted summary judgment for defendants. Holders appealed. The Court of Appeals, Wiener, Circuit Judge, held that: (1) case was properly removed pursuant to res judicata artful pleading exception to well pleaded complaint doctrine; (2) prior bankruptcy court orders authorizing and approving sale of leasehold estate free and clear

of encumbrances barred state action as to bank's successors-in-interest; (3) federal district court had supplemental jurisdiction over original lessors' successors-in-interest, who could not assert res judicata; and (4) original lessors' successors-in-interest were not personally liable to holders for loss of second mortgage.

Affirmed.

Edith H. Jones, Circuit Judge, dissented and filed opinion.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JONES and WIENER, Circuit Judges, and FURGESON,* District Judge.

WIENER, Circuit Judge:

Plaintiffs-Appellants Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr. (collectively, the Mirannes)[1] appeal the district court's order refusing to remand their case to the Louisiana state court from which it had been removed by Defendants-Appellees Regions Bank, Walter L. Brown, Perry S. Brown, and Fountainbleau Storage Associates (FSA) (collectively, the defendants). The Mirannes also appeal the district court's grant of the defendants' motions for summary judgment dismissing that action. Concluding that

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* District Judge of the Western District of Texas, sitting by designation.

[1] Edmond G. Miranne and Mary Anna Rivet are husband and wife, and Edmond G. Miranne, Jr. and Minna Ree Winer are husband and wife.

the district court correctly denied remand under the "artful pleading" exception to the well-pleaded complaint doctrine, we affirm the refusal to remand the Mirannes' suit to state court; and, agreeing that summary judgment of dismissal was providently granted on the basis of claim preclusion, we affirm.

I.
FACTS AND PROCEEDINGS

This action concerns the viability of a $5,000,000 second mortgage on the interest of the lessee (leasehold estate)[2] in a parcel of immovable property (leased premises) located at the intersection of Tulane and Carrolton Avenues in New Orleans, Louisiana.[3] In 1957, Lois Stern as lessor granted a ground lease of the leased premises to Pelican State Hotel Corporation as lessee. As a result of

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[2] "Leasehold estate" is a term unknown to the Civil Law, which does not recognize estates in land. *See* A.N. Yiannopoulos, 2 *Louisiana Civil Law Treatise* § 226 at 422-23 (3d ed.1991). In Louisiana, a lease of immovable (real) property is a personal (in personam) contract which does not create rights in rem; however, under provisions of various statutes, both predial (real estate) and mineral leases are afforded some of the attributes of rights *in rem*, notably the protection of the public records doctrine, including the susceptibility of the rights of the lessee to conventional (real estate) mortgages and the ranking of such encumbrances among themselves based on time of recordation. *See id.*, at 424-25, *and also* La.Rev.Stat. Ann. §§ 2721 & 2754-56 (West 1991).

[3] The location of the leased premises is a legendary one to many New Orleanians. For years the property was the site of Pelican Stadium, the home field of the old New Orleans Pelicans minor league baseball team.

several subsequent assignments, the leasehold estate was eventually acquired by Tulane Hotel Investors Limited Partnership (THILP) on September 15, 1983. On the same date, THILP granted a collateral mortgage (first mortgage) encumbering the leasehold estate to secure a $15,000,000 collateral mortgage note, which in turn was pledged as collateral on a loan from First Financial Bank (FFB).[4] In May of the following year, THILP granted another collateral mortgage (second mortgage) on the leasehold estate, this one to secure a $5,000,000 collateral mortgage note pledged to and held by the Mirannes.[5]

In 1985, little more than a year after granting the second mortgage, THILP filed for protection under Chapter 11 of the Bankruptcy Code. The bankruptcy was later converted to a Chapter 7 proceeding and a trustee was appointed. In the spring of 1986, the trustee applied for court approval to sell the leasehold estate at public auction, free and clear of essentially all encumbrances, specifically including the second mortgage.[6] The bankruptcy court issued an order advising all creditors and parties in interest who might oppose the proposed sale to serve any

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[4] See Max Nathan, Jr., *The Collateral Mortgage, Logic and Experience*, 49 La. L.Rev. 39 (1988), for a discussion of the collateral mortgage, that unique Louisiana "hybrid security device, combining the elements of both pledge and mortgage." *Id.* at 39-40.

[5] One of the holders of the note, Edmond G. Miranne, Jr., also appears to have been a partner of THILP.

[6] At this point, the leasehold estate consisted principally of the Bayou Plaza Hotel, formerly known as the Fountainbleau Hotel.

objections to the sale on the trustee and file such objections with the court by June 12, 1986. The court also set June 16, 1986 as the date for a hearing on the trustee's application. At the hearing, plaintiff Edmond G. Miranne, Jr., an attorney-at-law, appeared on behalf of himself, pro se, and his father, plaintiff Edmond G. Miranne, as holders of the note secured by the second mortgage. Their respective wives, plaintiffs Minna Ree Winer and Mary Anna Rivet, did not appear in person; neither were they identified by name as being represented by Miranne, Jr.

On the day after the hearing, the bankruptcy court granted the sale application and ordered that the leasehold estate be sold free and clear of virtually all liens and encumbrances, expressly identifying the second mortgage held by the Mirannes as one of the myriad encumbrances to be canceled. As no appeal was taken from that order, the trustee proceeded with the public auction of the leasehold estate. At the auction, FFB, the holder of the first mortgage, submitted the only bid. Approximately two months later, the bankruptcy court approved the auction results, directed that the sale of the leasehold estate to FFB be consummated, and ordered the Recorder of Mortgages for Orleans Parish to cancel the liens and encumbrances listed, which expressly included the second mortgage held by the Mirannes. Despite the bankruptcy court's order, however, the second mortgage was, for some as yet unexplained reason, never canceled and remained inscribed on the public records of Orleans Parish.

Secor Bank eventually succeeded FFB as owner of the leasehold estate. In December 1993, Defendants-

Appellees Walter L. Brown and Perry S. Brown, successors-in-interest to the original lessors, sold the leased premises to Secor, thereby vesting Secor with perfect ownership of the leased premises.[7] Later the same day, Secor in turn conveyed its newly acquired full ownership in the leased premises to FSA, which remained the record owner as of the commencement of the instant litigation. Secor was thereafter succeeded by Regions.

A year later, the Mirannes filed this suit in Louisiana state court against the defendants, alleging that the December 1993 transactions – in which the Browns conveyed their interest in the leased premises to Secor (which already owned the leasehold estate), and Secor in turn conveyed the leased premises in full ownership to FSA – had the net effect of canceling the lease and thereby abrogating the Mirannes' purported rights under the second mortgage which, they alleged, still encumbered the leasehold estate. The Mirannes sought (1) to have the second mortgage recognized and enforced, via ordinaria, against the immovable property located on the leased premises, or (2) alternatively, damages. In their complaint, the Mirannes assiduously avoided any hint of

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[7] Under Louisiana Civil Code Article 1903, an obligation may be extinguished by "confusion" when the qualities of obligee and obligor are united in the same person. Thus when a lessor's interest and a lessee's interest in the same immovable property are consolidated in the same person, the lease ceases to exist and the person vested with both interests will hold perfect or full ownership – essentially the equivalent of "fee simple" title in the common law. *See Ranson v. Voiron*, 176 La. 718, 146 So. 681, 682 (1931).

the previous bankruptcy proceedings and orders affecting the leased premises, the leasehold estate, and their second mortgage against it.

The defendants removed the case to federal district court, asserting federal question jurisdiction on the theory that the 1986 bankruptcy court orders expressly extinguished the Mirannes' rights under the second mortgage. Following removal, Regions and FSA filed motions for summary judgment asserting, inter alia, claim preclusion based on the bankruptcy court's orders. The Browns also filed for summary judgment adopting Regions and FSA's claim preclusion defense and asserting, as a separate and independent basis for dismissal, the Mirannes' failure to state a cause of action against the Browns. More or less simultaneously, the Mirannes sought remand, contending that the bankruptcy court orders at most provided defendants with an affirmative defense and thus could not confer removal jurisdiction. The district court denied the Mirannes' motion to remand, relying primarily on the principles announced by this court in *Carpenter v. Wichita Falls Independent School District*.[8] At the same time, the court granted summary judgment in favor of FSA and Regions on claim preclusion grounds, and in favor of the Browns on their separate and independent grounds. The Mirannes timely filed a notice of appeal from these rulings.

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[8] 44 F.3d 362 (5th Cir.1995).

II.
ANALYSIS

A. Removal Jurisdiction – Basic Principles

We have recently reviewed the well established principles governing federal question removal jurisdiction.[9] The denial of a motion to remand an action removed from state to federal court presents a question of federal subject matter jurisdiction and statutory construction which we review *de novo* on appeal.[10] As a defendant's use of the removal statute[11] deprives a state court of a case properly before it and thereby implicates concerns of federalism, that statute must be strictly construed.[12] It follows that the defendant who seeks to sustain removal must also bear the burden of establishing federal jurisdiction over the subject matter of the state court suit.[13]

As a general proposition, removal hinges on whether a federal district court could have asserted original jurisdiction over the state court action had it initially been filed in federal court.[14] When a defendant seeks to remove a state court suit on the basis of federal question

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[9] *See id.* at 365-67.

[10] *Garrett v. Commonwealth Mortgage Corp. of America*, 938 F.2d 591, 593 (5th Cir.1991).

[11] 28 U.S.C. § 1441.

[12] *Carpenter*, 44 F.3d at 365-66.

[13] *Id.* at 365.

[14] *See* 28 U.S.C. § 1441(a).

jurisdiction, as was the case here, removal will be appropriate only if the action is one "arising under the Constitution, laws or treaties of the United States."[15] In most cases, a defendant's assertion of federal question removal jurisdiction will rise or fall on the allegations in the plaintiff's "well-pleaded complaint,"[16] that is, on whether "there appears on *the face of the complaint* some substantial, disputed question of federal law."[17] This means that the defendant must predicate his assertion of federal jurisdiction on the allegations of the plaintiff's claim, not, for example, on the basis of an anticipated or even an inevitable federal defense.[18] As Justice Cardozo succinctly put it, the defendant must show that a federal right is "an element, and an essential one, of the plaintiff's cause of action."[19]

B. Artful Pleading Exception – Federal Res Judicata

Federal courts have over the years created but a few narrow exceptions to the fundamental precept of the well-pleaded complaint doctrine that "[t]he plaintiff is master of her complaint."[20] The common rationale for

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[15] 28 U.S.C. §§ 1331 & 1441(b).

[16] *Carpenter*, 44 F.3d at 366 (citing *Louisville & Nashville R. Co. v. Motley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908)).

[17] *Carpenter*, 44 F.3d at 366 (citing *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12, 103 S.Ct. 2841, 2848, 77 L.Ed.2d 420 (1983)) (emphasis added).

[18] *Carpenter*, 44 F.3d at 366.

[19] *Gully v. First Nat'l Bank*, 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936).

[20] *Carpenter*, 44 F.3d at 366.

these jurisprudential exceptions – euphemistically known by the cynically sarcastic sobriquet of the "artful pleading exception" – is that when a plaintiff has available "no legitimate or viable state cause of action, but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law."[21]

The first and best known specie of artful pleading is the one that arises when the area of state law upon which a plaintiff's claim is based has been "completely pre-empted" by federal law; i.e., when the "pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.' "[22]

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[21] *Id.* We note that another jurisprudentially created doctrine, more frankly labeled "fraudulent joinder," supports the assertion of removal jurisdiction on the basis of diversity of citizenship when a plaintiff's well-pleaded complaint would not otherwise allow removal because of the joinder of a non-diverse defendant. Even though we give great deference to the allegations found in the plaintiff's state court complaint, we will nevertheless examine the questioned joinder of a non-diverse defendant and hold it to be fraudulent under this doctrine when there is no possibility of recovery against that party. *See Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir.1992); *Carriere v. Sears Roebuck and Co.*, 893 F.2d 98, 100 (5th Cir.1990). The parallel between the fraudulent joinder exception and the artful pleading exception should be obvious.

[22] *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318 (1987) (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65, 107 S.Ct. 1542, 1547, 95 L.Ed.2d 55 (1987)).

Only a few types of claims have been held to be "completely pre-empted," though – most notably those pre-empted by Section 302 of the Labor Management Relations Act of 1947 or by Section 502 of the Employment Retirement Income Security Act of 1974.[23]

A second and somewhat rarer specie of artful pleading that justifies an exception is the one exemplified by the case we consider today, as illustrated in *Federated Department Stores v. Moitie*[24] – claim preclusion or res judicata. In Moitie, seven plaintiffs had filed and lost a consolidated antitrust suit in federal court.[25] Five of the seven plaintiffs appealed the district court decision, but two (Brown and Moitie) elected to file almost identical second suits (*Brown II* and *Moitie II*) in state court, facially based exclusively on state law. After the defendants removed these two state court suits, Brown and Moitie sought remand to state court. The district court first denied Brown's and Moitie's motions to remand, finding that their state court actions "were properly removed to federal court because they raised 'essentially federal law'

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[23] *See Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n. of Machinists*, 390 U.S. 557, 559, 88 S.Ct. 1235, 1237, 20 L.Ed.2d 126 (1968) (§ 302 of LMRA); *Metropolitan Life*, 481 U.S. at 65-66, 107 S.Ct. at 1547-48 (§ 502 of ERISA).

[24] 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981).

[25] Six of the plaintiffs had originally filed their suits in federal court, and one plaintiff who originally filed suit in state court saw his action removed to federal court on federal question and diversity jurisdiction grounds. The district court found that all of the plaintiffs had failed to allege an "injury" to their "property or business" within the meaning of § 4 of the Clayton Act, 15 U.S.C. § 15. *Id.* at 395-96.

claims," then dismissed the claims on res judicata grounds.[26]

In the meantime, the Ninth Circuit had ruled in favor of the other original federal plaintiffs – the five who had appealed their district court losses – based on a supervening Supreme Court decision that had worked a substantive change in pertinent antitrust law. Consequently, when the two state court plaintiffs, Brown and Moitie, appealed the district court's denial of their motions to remand and its subsequent dismissals for res judicata, the Ninth Circuit reversed the district court on the merits of its res judicata determination, but – importantly – only after affirming the district court's assertion of removal jurisdiction and denial of remand.[27] The Supreme Court then granted *certiorari* to consider, specifically, the preclusion issues raised by the Ninth Circuit's res judicata analysis.[28]

Although the Supreme Court's decision was primarily focused on the substantive preclusion issues thus presented, the Court, of necessity, also affirmed the district courts' original assertion of removal jurisdiction over *Brown II* and *Moitie II* and the Ninth Circuit's affirmance of that jurisdiction. In a lengthy footnote, the Court stated:

> The Court of Appeals also affirmed the District Court's conclusion that *Brown II* was properly

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[26] *Id.* at 396-97.

[27] *Id.* at 397-98.

[28] *Id.* at 398 ("We granted certiorari . . . to consider the validity of the Court of Appeals' novel exception to the doctrine of res judicata.").

> removed to federal court, reasoning that the claims presented were "federal in nature." *We agree that at least some of the claims had a sufficient federal character to support removal.* As one treatise puts it, courts will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and that] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization. 14 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3722, pp. 564-566 (1976) (citing cases) (footnote omitted). The District Court applied that settled principle to the facts of this case. . . . We will not question here that factual finding.[29]

Regrettably, the Supreme Court did not explain precisely what there was about the plaintiffs' state law claims that was so "federal in nature" as to support removal under the artful pleading exception.

Even though at least one district court and one commentator have suggested that *Moitie* should be disregarded either as an aberration that has never been confirmed by the Supreme Court or as an injudicious application of an already suspect doctrine,[30] the circuit courts have nevertheless attempted, as they must, to find

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[29] *Id.* at 397 n. 2 (emphasis added).

[30] *See Magic Chef, Inc. v. Int'l Molders & Allied Workers Union*, 581 F.Supp. 772, 776 n. 4 (E.D. Tenn.1983) (claiming that *Moitie*'s value as authority regarding removal jurisdiction was superseded by the Supreme Court's opinion in *Franchise Tax Bd.*, which was written by Justice Brennan, a vocal dissenter in *Moitie*, and which does not cite *Moitie* at all); Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 Hastings L.J. 273, 303-315 (1993).

meaning in *Moitie*'s enigmatic footnote. As it happens, different circuits have articulated one or the other of two distinct rationales for the Supreme Court's use of the artful pleading exception in its approval of the district court's denial of remand in *Moitie*.

One rationale was offered in *Travelers Indemnity Co. v. Sarkisian*,[31] in which the Second Circuit interpreted *Moitie* to permit removal whenever a plaintiff files a complaint based on federal law in federal court and subsequently files an ostensible state law claim in state court containing essentially the same elements. Consistent with the well-pleaded complaint doctrine, this "election of forums" or "consent" rationale recognizes in essence that a plaintiff remains the master of his complaint, but engrafts on this doctrine the limitation that the plaintiff is allowed but one opportunity to characterize his claims.[32]

Reasoning that the Second Circuit's "election of forums" rationale would lead to an unwarranted and excessive expansion of federal removal jurisdiction, the Ninth Circuit, in *Sullivan v. First Affiliated Securities, Inc.*,[33] concluded that *Moitie* is better explained as permitting removal of only those subsequent state court claims that are barred by the res judicata effect of a prior federal

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[31] 794 F.2d 754, 760-61 (2nd Cir.), *cert. denied*, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986).

[32] *See* Ragazzo, 44 Hastings L.J. at 307-308.

[33] 813 F.2d 1368, 1374-75 (9th Cir.), *cert denied*, 484 U.S. 850, 108 S.Ct. 150, 98 L.Ed.2d 106 (1987) (critiquing the election of forums rationale as applied in *Sarkisian* and as discussed in dicta of an earlier Ninth Circuit decision, *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423 (9th Cir.1984)).

judgment.[34] As the Ninth Circuit later put it, a plaintiff's state law claim may be classified as " 'artfully pleaded' when it is drafted to avoid stating allegations or claims already resolved by a prior federal judgment."[35] In a number of subsequent cases, the Ninth Circuit, as well as other circuits, have endorsed *Sullivan*'s articulation of this "federal res judicata" rationale for *Moitie* and have applied *Sullivan*'s principles, all the while recognizing that this additional branch of the artful pleading exception must be used sparingly, in the narrow and exceptional circumstances described by *Sullivan* and *Moitie*.[36]

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[34] *Id.* at 1376 ("We therefore construe *Moitie* as limited to removal of state claims precluded by the res judicata effect of a federal judgment.").

[35] *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1403 (9th Cir.1988); *see also Clinton v. Acequia, Inc.*, 94 F.3d 568, 571 (9th Cir.1996) (stating that Ninth Circuit has consistently "found the artful pleading doctrine to support removal where a plaintiff files his state law claims in state court in an attempt to circumvent the res judicata effect of a prior federal claim that has been reduced to judgment").

[36] *See e.g., Ultramar America Limited v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir.1990) (acknowledging that *Sullivan* recognized a new basis for invoking the artful pleading doctrine but noting that recharacterization of a state court claim under the res judicata branch of the doctrine may only occur when prior federal judgment resolved issues of *federal* not *state* law); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 912 (7th Cir.1993) (recognizing *Ultramar* distinction but also finding that removal was improper because no res judicata was present); *Ethridge*, 861 F.2d at 1403 (endorsing *Sullivan* but finding that removal was improper because federal court lacked subject matter jurisdiction over complaint in prior and allegedly preclusive federal action); *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 908 F.2d 477, 480 (9th Cir.1990) (applying *Sullivan* rule but holding that

In *Carpenter v. Wichita Falls Ind. School District*,[37] a panel of this court squarely confronted the same interpretive issue presented to the Ninth Circuit by *Sullivan*.[38] Explicitly rejecting the Second Circuit's expansive election of forums approach and agreeing with the Ninth Circuit's "narrower interpretation,"[39] we concluded in *Carpenter* that the "federal character" of the plaintiffs' claims justifying removal in *Moitie* must be found in the federal law of preclusion.[40] In so doing we were careful to reiterate our continuing confidence that state courts would comply with their Supremacy Clause obligation to apply federal rules of res judicata.[41]

In addition, we emphasized our awareness that defendants in state court suits frequently have the option of employing the relitigation exception to the Anti-

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removal was improper because plaintiff's claim had never previously been before a federal court and no res judicata defense was available to defendants).

[37] 44 F.3d 362 (5th Cir.1995).

[38] In *Carpenter*, the plaintiff, a school administrator, filed two separate suits against the school district she worked for – one in federal court alleging violations of her free speech rights under the First Amendment to the United States Constitution and one in state court stating a state contract claim and a free speech claim exclusively under the Texas Constitution. 44 F.2d at 365. Similarly, *Sullivan* involved a federal action under federal securities law and another similar and simultaneous action in state court under state securities law. 813 F.2d at 1370.

[39] *Carpenter*, 44 F.3d at 369 n. 6, 370 n. 12.

[40] *Id.* at 370.

[41] *Id.*

Injunction Act,[42] as an alternative approach to disposing of a state court suit that is precluded by a prior federal judgment. The fact that a defendant could seek to enjoin a state court action and thereby, if successful, achieve the same result that he might have obtained had he instead sought to remove and dismiss the suit under *Moitie*, does not, Judge Garwood expressly observed in *Carpenter*, render *Moitie* superfluous. Rather, Judge Garwood went on to explain, the co-extensive nature of the relitigation exception to the Anti-Injunction Act on the one hand and the artful pleading exception to the well-pleaded complaint doctrine – based on *Moitie*'s federal res judicata grounds – on the other hand simply suggests that "any potential impact on federalism from removal [in *Moitie*] was not significant."[43] In thus clearly setting forth the rule for this circuit, the *Carpenter* panel concluded by stating that:

> [w]e *hold* that *Moitie* should apply only where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law.[44]

Returning to the case now before us, we conclude that the district court properly reasoned that *Carpenter*'s holding provides the sole framework for analyzing the jurisdictional issues raised by the Mirannes' thinly veiled

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[42] 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a state court except . . . *to protect or effectuate its judgments.*") (emphasis added).

[43] *Id.*

[44] *Id.* (emphasis added).

collateral attack on the bankruptcy court's prior orders. The fact that in *Carpenter* the federal res judicata artful pleading rationale did not, in the end, support removal under the specific circumstances of that case – there was no prior federal case and no prior federal judgment, just two simultaneously filed suits, one based on federal law and one scrupulously – "artfully" – based solely on state law – does not, as the Mirannes now contend, render Judge Garwood's carefully articulated holding in *Carpenter* dicta. To the contrary, and just as the district court here found, *Carpenter* controls. Accordingly, if the defendants can show that the Mirannes' state court suit, purportedly brought to enforce their erstwhile second mortgage, is in fact barred by the claim preclusive effects of the bankruptcy court's 1986 orders that authorized and approved the sale of the leasehold estate free and clear of that mortgage and mandated its cancellation, then the district court's denial of the Mirannes' motion to remand, and its dismissal of their suit for essentially the same reason, must be affirmed.

C. The Bankruptcy Court's 1986 Orders Bar the Mirannes' Present Suit

Under the "pure" res judicata or claim preclusion rubric as developed in this circuit, a prior judgment will operate to preclude a later filed suit if four elements are present: (1) The parties in the later action are identical to, or at least in privity with, the parties in the prior action; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action concluded with a final judgment on the merits; and (4) the

same claim or cause of action is involved in both actions.[45] As we find beyond peradventure that all four elements subsist in the instant case, we conclude, just as did the district court, that the claims presented by the Mirannes' subsequent state court action, ostensibly seeking to enforce their second mortgage, are in fact precluded by the bankruptcy court's 1986 orders.

1. *Identity and Privity of the Parties*

The bankruptcy court's order authorizing the sale of the leasehold estate reflects that Edmond G. Miranne Jr., an attorney-at-law, appeared in court on the previous day, both pro se and as counsel for his father, in connection with the pending sale application by the trustee. The fact that the Mirannes' wives, Rivet and Winer,[46] did not personally appear and were not expressly identified by Miranne Jr. as parties that he represented, is of no significance. We have previously held that one individual's participation in a bankruptcy proceeding may bind a non-party, such as a spouse, whose interests are closely aligned with and adequately represented by the person who did appear.[47] Here, Rivet and Winer had interests identical to those of their husbands in the bankruptcy proceeding – namely the preservation (more accurately

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[45] *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir.1994).

[46] In Louisiana, married women are entitled to retain and use their maiden names, and frequently do so in legal documents, such as deeds, mortgages, and pleadings, especially in New Orleans and the "country parishes" of South Louisiana. *See* La. Civ.Code art. 100.

[47] *Eubanks v. F.D.I.C.*, 977 F.2d 166, 170 (5th Cir.1992).

here, the resurrection) and protection of the second mortgage. In fact, their subsequent state court complaint listed only the husbands as owners of the collateral mortgage note, even though it was presumptively community property under Louisiana law.[48] Consequently, the husbands' participation in the 1986 bankruptcy proceedings by way of Edmond G. Miranne, Jr.'s appearance at the sale application hearing served as adequate representation of the interests of the spouses in community and was thus no less binding on the wives for claim preclusion purposes than it was on their husbands.[49]

With respect to the defendants, there is no dispute that FFB was a party to the bankruptcy proceedings as holder of the first mortgage and the eventual purchaser of the leasehold estate at the public auction. Neither is there doubt that Regions and FSA are successors-in-interest to FFB with respect to the property affected by the

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[48] *See* La. Civ.Code art. 2340 ("Things in possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property.").

[49] Under Louisiana's community property laws, the rule of equal management generally applies to community property; however, the concurrence of both spouses is required for the alienation, encumbrance or lease of community immovables and in other limited situations specified by law. La. Civ.Code arts. 2346-47. As the collateral mortgage note held by the Mirannes is classified as an "incorporeal movable," concurrence of the Mirannes' spouses would not have been required for the husbands to alienate whatever rights flowed from their ownership of the note and the mortgage securing it. *See* Nathan, 49 La. L.Rev. at 44.

bankruptcy court orders. Again, the rule is well established that a judgment may have claim preclusive effect on a non-party if the non-party is a successor-in-interest to a party's interest in property affected by the judgment.[50] Consequently, both Regions and FSA are bound by the bankruptcy court's orders to the same extent as is their predecessor, First Financial. Accordingly, we conclude that the first element of claim preclusion is clearly satisfied in this case with respect to all four plaintiffs and to defendants Regions and FSA.[51]

2. *A Court of Competent Jurisdiction and A Final Judgment*

The second and third claim preclusion elements are also present in the instant case. As a general proposition, district courts have jurisdiction over cases or civil proceedings arising under Title 11, or arising in or related to cases under Title 11.[52] It follows that a district court has jurisdiction to authorize and approve a trustee's sale.[53]

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[50] *Meza v. General Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir.1990); *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 188 (5th Cir.1990).

[51] We acknowledge that this first condition of claim preclusion cannot be satisfied with respect to the Browns, but we dispose of the jurisdictional wrinkle raised by this fact below. *See infra* Part E.

[52] 28 U.S.C. § 1334(a),(b).

[53] *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 870 (5th Cir.1984); *In re Heine*, 141 B.R. 185, 187 (Bank.D.S.D.1992); *see also Matter of Baudoin*, 981 F.2d 736, 740 (5th Cir.1993) (recognizing wide reach of jurisdiction under Title 11).

Indeed, a proceeding to sell property free and clear of liens pursuant to 11 U.S.C. § 363(b) and (f) is a core proceeding in which the bankruptcy court has jurisdiction to issue final orders and judgments.[54] Here the proposed sale of the leasehold interest arose under and was related to THILP's chapter 7 bankruptcy case. Consequently, the bankruptcy court had jurisdiction to consider the Trustee's sale application and to issue the ensuing orders (1) authorizing the sale of the leasehold estate free and clear of specified junior liens, expressly including the second mortgage held by the Mirannes, and (2) approving that sale and directing the cancellation of those specified inferior encumbrances.

Although they characterize the bankruptcy court's sale orders as actions beyond the "power" of the bankruptcy court under the rules and provisions of the Bankruptcy Code,[55] the Mirannes' authority for this proposition does not comport with Congress' jurisdictional grant to the district court – and its adjunct, the bankruptcy court – to determine whether property of a debtor should be sold free and clear of liens and encumbrances. The Mirannes, of course, were entitled to question whether the bankruptcy court properly exercised the powers granted to it by 11 U.S.C. § 363 in the

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[54] 28 U.S.C. § 157(a),(b)(2)(N); *Heine*, 141 B.R. at 188.

[55] Appellants principally contend that the bankruptcy court order extinguishing the second mortgage was invalid because the order did not result from an adversary proceeding as required by Fed. R. Bank. Proc. 7001 and because the court did not satisfy the provisions of § 363(f)(1)-(5).

particular circumstances of this case. This kind of substantive – but *not* jurisdictional – objection to a bankruptcy court's orders, however, is one that had to have been timely raised either in an appeal or a motion for reconsideration, not eight years after the fact in a state court collateral attack on those orders. We reject out of hand the Mirannes' specious contention that, for claim preclusion purposes, the bankruptcy court lacked jurisdiction to issue the 1986 sale orders.

In addition, an order by a bankruptcy court authorizing or approving the sale of an asset of the bankrupt estate is a final judgment on the merits for res judicata purposes even if the order neither closes the bankruptcy case nor disposes of any claim.[56] Therefore, there can be no serious question that the bankruptcy court's 1986 orders authorizing and approving the sale of the leasehold estate free and clear of essentially all liens and encumbrances were final judgments capable of precluding the Mirannes' later filed state court collateral attack. It is equally beyond serious question that these final judgments affected issues of federal law: Bankruptcy is a quintessential federal question.

3. The Same Cause of Action

In conducting our search for the presence of the fourth element required for the applicability of claim preclusion, we employ the transactional test of Section 24

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[56] *Matter of Baudoin*, 981 F.2d at 742; *Hendrick v. Avent*, 891 F.2d 583, 586 (5th Cir.), *cert. denied*, 498 U.S. 819, 111 S.Ct. 64, 112 L.Ed.2d 39 (1990); *Southmark Properties*, 742 F.2d at 870.

of the *Restatement (Second) of Judgments* to determine whether the two suits in question involve the same claim for purposes of claim preclusion.[57] Under the "same claim" inquiry, the critical issue is whether the two actions under consideration are based on the *same nucleus of operative facts*.[58]

In the instant case, we find that both the bankruptcy court's 1986 orders authorizing and approving the sale of the leasehold estate free and clear of the Mirannes' second mortgage and the Mirannes' claims in their state court action are unquestionably based on, and in fact are entirely dependent on, the same nucleus of operative facts – namely, the viability, the validity, the enforceability of the second mortgage. In "artfully" contending that their putative state cause of action arises solely out of the December 1993 transaction involving the Browns, Secor and FSA, the Mirannes studiously ignore the fact their claim relative to that 1993 transfer can go absolutely nowhere unless they can establish that their second mortgage was alive and well at that time, despite the 1986 bankruptcy court orders that expressly authorized and approved the sale of the leasehold estate free and clear of that mortgage and directed that it be canceled from the mortgage records of Orleans Parish.

Without an extant enforceable mortgage, the Mirannes cannot forthrightly plead either a right of action or a cause of action in state court. Indeed, all of the acts of

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[57] *Matter of Baudoin*, 981 F.2d at 743; *Southmark Properties*, 742 F.2d at 870-71.

[58] *Matter of Baudoin*, 981 F.2d at 743.

alleged wrongdoing in the December 1993 transaction are so inextricably intertwined with and dependent on the 1986 bankruptcy orders directing and approving the sale of the leasehold estate free and clear of the second mortgage that we would be hard pressed to conjure up a better hypothetical example of two actions arising from the same nucleus of operative facts. In this regard we remain ever mindful of the basic canon of Louisiana law that the public records do not create rights; the existence of the uncanceled *inscription* of the second mortgage on the public records could not keep the mortgage itself legally viable after the obligation it secured – the collateral mortgage note – as well as the mortgage, were terminated in the bankruptcy of the maker/mortgagor, THILP.

A review of relevant case law applying res judicata principles in the bankruptcy context further confirms our analysis. On one hand, our decisions have consistently held that under the transactional test a final bankruptcy court *sale* bars any subsequent claims that challenge the finality or integrity of the transfer of title pursuant to that sale.[59] On the other hand, the Mirannes' reliance on *D-1 Enterprises, Inc. v. Commercial State Bank*,[60] a case in which we held that res judicata does *not* apply to claims that

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[59] *See Southmark Properties*, 742 F.2d at 870-72 (debtor's later filed lender liability action barred by bankruptcy court's order authorizing sale of property in debtor's estate "free and clear of all . . . claims" to secured creditor as both involved "common nucleus of operative facts"); *Hendrick*, 891 F.2d at 587 (trustee's actions under RICO and securities laws barred by bankruptcy court's sale order authorizing transfer of title of stock against which trustee had launched his collateral action).

[60] 864 F.2d 36 (5th Cir.1989).

were largely unrelated to and which could not have been raised in an earlier bankruptcy proceeding, is inapposite to the instant case. Unlike the situation in *D-1 Enterprises*, here the Mirannes had far more than a mere opportunity to object to the sale of the leasehold estate in the bankruptcy court: They were invited by the court to file their objections; they actually appeared in court at the hearing scheduled for the airing of such objections; and once the court issued its sale order, they could have timely filed either a motion for reconsideration – or a notice of appeal – but they did neither. Given their personal attendance, together with these multiple waived or forfeited opportunities to raise and litigate their objections (if any) to the sale, the Mirannes cannot now contend – at least not with a straight face – as did the debtor in *D-1 Enterprises*,[61] that claim preclusion should not be applied because their claim could not have been effectively litigated in the earlier proceeding.

Indisputably, all requisites of claim preclusion are present here, vis-á-vis Regions and FSA. As to these two defendants, therefore, we affirm the district court's refusal to remand the Mirannes' previously removed action under the artful pleading exception to the well-pleaded complaint doctrine.

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[61] In *D-1 Enterprises*, we found that the lender liability claims that debtor sought to assert in the later action were not "direct defenses" that the debtor could or should have litigated in response to the creditor's earlier motion for relief from stay. *Id.* at 39. Furthermore, *D-1 Enterprises* also distinguished *Southmark* in which preclusion was appropriate in the context of a "court-ordered public cash auction." *Id.*

D. The "Actually Litigated" Standard

As we noted above, and as this court previously observed in *Carpenter*, the relitigation exception to the Anti-Injunction Act provides another, entirely independent mechanism which defendants (and the federal courts) may use to protect prior federal court judgments.[62] In *Carpenter* we reasoned that, as the relitigation exception to the Anti-Injunction Act had "already realigned federal-state relations in favor of the federal courts," *Moitie's* use of the res judicata branch of the artful pleading exception signified nothing more than that "any potential impact on federalism from removal was not significant."[63] Thus two lessons are to be gleaned from *Carpenter*: (1) Issues of federalism are not implicated in this context; and (2) the relitigation exception to the Anti-Injunction Act – a route that parallels (but is not identical to) removal via the res judicata iteration of the artful pleading exception – is not the exclusive path available for squelching precluded sequential state court litigation of claims previously litigated in federal court.

Nevertheless, in reliance on the above-quoted limited discussion of how the Anti-Injunction Act co-exists with the federal res judicata interpretation of *Moitie*, the Mirannes imaginatively contend that the court in *Carpenter* implicitly incorporated the specific restraints of the relitigation exception into its res judicata artful pleading exception based on *Moitie*. In particular, they contend that removal under *Carpenter* is somehow limited by the

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[62] *See supra* Part B, *and* 44 F.3d at 370.

[63] *Id.*

anti-injunction holding in *Chick Kam Choo v. Exxon Corp.*[64] The Mirannes argue that *Chick Kam Choo* stands for the proposition that injunctions may be issued under the relitigation exception to § 2283 only with respect to issues that were "actually litigated" in the prior proceeding – that is, only in circumstances in which *issue* – but not claim – preclusion would apply in a successive proceeding; and that such a limitation must per force restrict the artful pleading exception to issue preclusion. This stretch by the Mirannes, in attempting to incorporate an "actually litigated" restriction into *Carpenter,* is fatally flawed, however.

First, we note that nowhere in *Carpenter* did we even mention, much less impose, an "actually litigated" standard for removal under the res judicata branch of the artful pleading exception; neither did we so much as refer to *Chick Kam Choo,* much less cite it as authority. Second, we are aware of no other court that, when applying the federal res judicata manifestation of the artful pleading exception following *Sullivan,* has seen fit to apply – or even mention – this standard.

But even if we assume, solely for the sake of argument, that an "actually litigated" requirement was imported through *Carpenter,* we would still find that removal is proper under the circumstances of this case. In *Chick Kam Choo,* the Supreme Court, relying on *Atlantic Coast Line R. Co. v. Locomotive Engineers,*[65] stressed that:

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[64] 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988).

[65] 398 U.S. 281, 286-287, 90 S.Ct. 1739, 1742-43, 26 L.Ed.2d 234 (1970).

> an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings *actually have been decided* by the federal court. Moreover, Atlantic Coast Line illustrates that this prerequisite is strict and narrow. The court assessed the precise state of the record and what the earlier federal order *actually* said; it did not permit the District Court to render a post hoc judgment as to what the order was *intended* to say.[66]

For the bankruptcy court in the instant case to authorize and approve the sale of the leasehold estate free and clear of essentially all liens and encumbrances, that court necessarily had to *decide* whether the Mirannes' inferior second mortgage could survive as an encumbrance against the leasehold estate after that estate was sold at public auction by the THILP trustee's foreclosure on the superior first mortgage. Indeed, the bankruptcy court's order authorizing sale of the leasehold estate "*actually* said," inter alia, that (1) Edmond G. Miranne, Jr. appeared on his and his father's behalf, (2) all creditors were given notice and an opportunity to object and be heard, and (3) the sale of the leasehold estate would be free and clear of "all . . . liens, mortgages and encumbrances," including, specifically, the Mirannes' second mortgage. Given *Chick Kam Choo's* admonition to focus on "what the earlier federal order *actually* said," not what "the order *intended* to say" (albeit likely the same thing in this case), it is

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[66] *Chick Kam Choo,* 486 U.S. at 148, 108 S.Ct. at 1690-91 (emphasis in original).

indisputable that in the 1986 bankruptcy court proceedings the continuing validity of the Mirannes' inferior mortgage was "actually litigated and decided."[67]

E. Response to Dissent

Although our colleague, Judge Jones, in her thoughtful dissent agrees with our essential holding that *Moitie* permits removal of state court claims that are barred by the preclusive res judicata effect of a prior federal judgment, she would further limit application of *Moitie's* res judicata removal avenue to cases in which (1) "the prior judgment . . . involved a claim *made* under federal law," and (2) "the claim being removed represented a plaintiff's attempt to seek relief in state court by recharacterizing an 'essentially federal' claim they [sic] had *unsuccessfully pursued first in federal court.*"[68] We acknowledge the overarching federalism concerns that inform Judge Jones' critique, but we nevertheless find her additional suggested restrictions to our already narrow holdings in *Carpenter* and in the instant case to be unwarranted. First, the Ninth Circuit decision that Judge Jones cites in support of her additional restrictions, *Ultramar America Limited v. Dwelle*,[69] limits *Moitie* recharacterization (i.e., removal) to situations "when the prior federal judgment *resolved* questions of federal law," or "when the prior federal judgment *sounded* in federal law."[70] It does not, as far as

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[67] *Id.* at 149, 108 S.Ct. at 1691.

[68] Dissent, *infra*, at 2358 (emphasis added).

[69] 900 F.2d 1412 (9th Cir.1990).

[70] *Id.* at 1415-16 (emphasis added).

we can discern, purport to constrain *Moitie* removal to instances in which the *prior federal judgment* arose out of a case that a plaintiff himself had first *brought* in federal court. True, that is what happened in *Moitie* and that may prove to be the most common circumstance in which *Moitie* removal will occur. But *Moitie's* sanctioning of removal, as we explained in *Carpenter*[71] and as the Ninth Circuit has suggested,[72] hinges on the *preclusive effects* of a *prior federal judgment* and a state court litigant's attempts to circumvent them artfully, *not* on the manner in which the case giving rise to the preclusive federal judgment reached federal court in the first place.

Indeed, we emphasize that the reasons Judge Garwood found in *Carpenter* that *Moitie* did not apply to the facts before his panel there were (1) there was no prior federal judgment to protect, (2) there was no federal preclusion law to apply, and (3) the plaintiff in *Carpenter*, unlike the plaintiffs in *Moitie*, was "taking preclusion risks in order to have her state law claim heard in its

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[71] 44 F.3d at 370 ("If there was any federal character at all to the plaintiffs' state law claims in *Moitie*, it must be the federal law of preclusion.")

[72] In *Ultramar*, the Ninth Circuit observed that:

> The *Moitie* doctrine seems based on a court divining a litigant's motives for bringing suit. When a litigant suffered a final defeat on a federal claim yet thereafter files a similar-although-not-preempted state claim in state court, the sequence of events gives rise to an inference that the litigant is not interested in the state cause of action per se, but is instead attempting *to circumvent the effects of the federal question judgment*. In this limited instance, removal is allowed.

900 F.2d at 1417 (emphasis added).

preferred forum" and thus was "not attempting to avoid the effect of a prior judgment."[73] As we have strived to make clear in this opinion, however, in this case we do have a prior federal judgment, we do have federal preclusion law to apply, and we have plaintiffs who have not taken any preclusion risks, but, to the contrary, are clearly seeking by collateral attack to avoid the preclusive effect of a prior federal judgment, long since in repose, that concluded a case in which these plaintiffs had ample opportunity to assert their interests and in fact did assert them. It follows, then, that removal of the plaintiffs' state court collateral attack on the bankruptcy court's final judgment is entirely appropriate in this case, even though the preclusive – and thus essentially federal – nature of that federal court judgment derived from the underlying bankruptcy case. Here, the plaintiffs were interested creditors who were invited to assert their rights based on their second mortgage; there simply was no lawsuit initially filed by these plaintiffs in federal court. Therefore, in spite of Judge Jones' objections, we remain firmly convinced that the Mirannes are not entitled to have their faux foreclosure suit remanded to state court under the well-pleaded complaint doctrine. To do so would make a mockery of that doctrine; the very kind of untoward result that the artful pleading exception – like the fraudulent joinder doctrine – is designed to prevent.

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[73] *Carpenter*, 44 F.3d at 371.

F. The Final Removal Twist – Supplemental Jurisdiction Over the Mirannes' Claims Against the Browns

To complete our analysis of the jurisdictional questions presented by this case, we address one final, relatively minor issue. The Mirannes insist that, even if the district court properly asserted removal jurisdiction as to Regions and FSA and properly denied remand as to those two defendants under the *Moitie/Carpenter* res judicata artful pleading exception, that court still could not exercise removal jurisdiction over the Mirannes' claims against the Browns. This is so, they urge, because the Browns were not parties to the 1986 bankruptcy proceedings that underlie the preclusion of the Mirannes' subsequent state court suit against FSA and Regions. We disagree. Although we do agree that the *Moitie/Carpenter* rationale is inapplicable to the Browns, the district court – having properly exercised *removal* jurisdiction as to the Mirannes' claims against Regions and FSA – could therefore exercise *supplemental* jurisdiction over the Mirannes' claims against the Browns. These claims clearly formed part of the "same case or controversy" as those against Regions and FSA.[74] Indeed, we have so found in a similar case involving the complete preemption branch of the artful pleading exception.[75]

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[74] *See* 28 U.S.C. § 1367.

[75] *See Kramer v. Smith Barney*, 80 F.3d 1080, 1086 & 1083 n. 1 (5th Cir.1996) (observing that if plaintiff's state law fiduciary duty claims relating to ERISA governed pension accounts were removable under complete preemption theory, plaintiff's other related, non-ERISA, state law claims were removable as supplemental claims under § 1367).

Accordingly, we hold that the district court did not err in asserting jurisdiction over each defendant named in the Mirannes' state court complaint, including the Browns. Neither did that court err in refusing to remand any of those claims to state court.

G. Motions for Summary Judgment

In the foregoing analysis, we determined that the Mirannes' removed state court suit, "artfully" styled as an action to enforce the second mortgage, was in truth nothing but a transparent, "second bite" collateral attack on the bankruptcy court's 1986 orders. It was a blatant attempt at a "gotcha," grounded exclusively in the purely fortuitous and inadvertent failure of some person or persons unknown to follow-up on the court ordered cancellation of the second mortgage from the public records. As a result, we concluded that the well-pleaded complaint doctrine did not immunize that second suit from removal.

In like manner, we now hold that the district court properly granted summary judgment in favor of Regions and FSA on the basis of claim preclusion. Despite its intentionally deceitful garb, the core issue of the Mirannes' subsequent state court complaint was the efficacy of the final, executory, non-appealable orders of the bankruptcy court that had freed the leased premises from, inter alia, the Mirannes' second mortgage. As that issue was and remains res judicata, we affirm the district court's summary judgment in favor of Regions and FSA.

We also affirm the district court's grant of summary judgment in favor of the Browns albeit we do so on the

separate and independent ground that the Mirannes failed to establish any legal basis or triable issue of fact to support a claim against the Browns. As the district court observed, the Mirannes first acknowledged that the Browns did not participate in the prior bankruptcy proceedings, thereby casting doubt on whether the Browns could be held responsible for the Mirannes' loss of rights as a result of those proceedings. In addition, the Mirannes also characterized their action as one *in rem*, i.e., a claim to a right in the property, not one *in personam* against its *former* owners, thus precluding any personal liability on the Browns' part.[76] In sum, as the Browns had no contractual relationship at all with the Mirannes and had long since ceased to have any interest in the property which the Mirannes doggedly contend is still encumbered by their second mortgage, the Browns can have no personal liability to the Mirannes whatsoever. The district court properly granted the Browns' motion for summary judgment.

III

CONCLUSION

As should now be apparent from the foregoing analysis, we conclude that the district court correctly held

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[76] *See Louisiana Nat. Bank of Baton Rouge v. O'Brien*, 439 So.2d 552, 556-58 (La.Ct.App. 1st Cir.1983), *writ denied*, 443 So.2d 590 (La.1983) (holding that note marked "in rem" gave maker no liability at all beyond property itself and that creditor was unable to maintain any action against maker to reach any of maker's other assets).

that the Mirannes are not entitled to have their previously removed state court suit remanded to state court under the well-pleaded complaint doctrine. The claim preclusion or res judicata branch of the artful pleading exception to that doctrine demonstrates beyond cavil that their state court suit, filed subsequent to the final judgments of the bankruptcy court on issues of federal law, need not be remanded. For essentially the same reasons, our de novo review of the district court's summary judgment dismissal of the Mirannes' claims against Regions and FSA satisfies us that the Mirannes' subsequent state court action, as removed to federal district court, is barred by res judicata. In like manner the court's exercise of supplemental jurisdiction over the claims against the Browns, and its dismissal of those claims, were not erroneous. Therefore, the district court's orders and judgment from which the Mirannes appeal are, in all respects,

AFFIRMED.

EDITH H. JONES, Circuit Judge, dissenting:

My brethren, conscientiously attempting to follow the guidance of *dicta* in a Fifth Circuit case[1] and a mystifying footnote by the Supreme Court,[2] have concluded that the federal district court possessed removal jurisdiction over a state court claim principally seeking foreclosure of a second mortgage. Were it not for the ambiguities in the two preceding cases, *Carpenter* and

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[1] *Carpenter v. Wichita Falls Independent School Dist.*, 44 F.3d 362 (5th Cir.1995).

[2] *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981).

Moitie, this result would fly in the face of the well-pleaded complaint limit on removal jurisdiction. I respectfully dissent because I believe the majority's unusual result is not compelled by the authorities. Briefly, *Moitie* means less than the majority asserts, and the *Carpenter dicta* explaining *Moitie* do not require the result here reached. I fear that the majority's result further confuses an already complex byway of federal jurisdiction.

Without repeating the majority's analysis, I agree in part with their holding that – until the Supreme Court clarifies *Moitie* – *Moitie* is "better explained as permitting removal of only those subsequent state court claims that are barred by the res judicata effect of a prior federal judgment." Critically, I would add that the prior judgment should have involved a claim made under *federal* law. *Ultramar America Limited v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir.1990).[3] I would also emphasize that *Moitie* permitted removal only where the claim being removed represented a plaintiff's attempt to seek relief in state court by recharacterizing an "essentially federal" claim

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[3] The majority argues that the *Ultramar* decision does not "purport to constrain *Moitie* removal to instances in which the *prior federal judgment* arose out of a case that a plaintiff himself had first *brought* in federal court." Maj. Op. at 2355 (emphasis in original). However, *Ultramar* did involve a plaintiff who had asserted a prior claim, and the majority has cited no case where *Moitie* removal has been allowed where the plaintiff had not brought a prior suit grounded in federal law. The majority implicitly acknowledges that while it is not "constrain[ed]" from allowing *Moitie* removal where the plaintiff has not brought a prior claim, it is broadening the scope of *Moitie* removal beyond what has been allowed in other circuits.

that they had unsuccessfully pursued first in federal court. *Moitie* thus is a species of the artful pleading doctrine, a doctrine that permits a federal court to pierce the pleadings of a complaint which, although cloaked in terms of state law, actually falls within federal jurisdiction because of the applicability of federal principles. *Moitie*, 452 U.S. at 398, n. 2, 101 S.Ct. at 2427, n. 2. While the circuit courts have split in interpreting *Moitie*,[4] this narrow understanding is accepted by the majority here and the Fifth Circuit and is well-grounded.[5]

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[4] *Compare Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754 (2d Cir.1986) (using plaintiff's choice of forum analysis to apply *Moitie*) *and Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368 (9th Cir.1987) (using res judicata analysis).

[5] The Supreme Court's statement in *Moitie* that "at least some of the claims had a sufficient character to support removal" should be interpreted in light of the authority and examples cited in support of that proposition. 452 U.S. at 397, n. 2, 101 S.Ct. at 2427, n. 2. After citing Professor Wright's treatise for the proposition that federal courts may determine the "real nature" of a plaintiff's claim, the Court cited three cases in which courts did just that. Two were antitrust cases in which plaintiffs had pleaded antitrust claims under a South Carolina statute and the South Carolina courts had held that the statute only applied to conduct in *intrastate* commerce, while the defendants' challenged conduct actually involved *interstate* commerce. *See In re: Wiring Device Antitrust Litigation*, 498 F.Supp. 79, 82-83 (E.D.N.Y.1980) *and Three J Farms, Inc. v. Alton Box Board Company*, 1979 – 1 Trade Cases ¶ 62,423, 1978 WL 1459 (D.S.C.1978), *rev'd on other grounds*, 609 F.2d 112 (4th Cir.1979), *cert. denied*, 445 U.S. 911, 100 S.Ct. 1090, 63 L.Ed.2d 327 (1980). In the third case, the plaintiff filed only state conspiracy claims, but the district court held that the claims implicated federal antitrust laws and labor issues governed by the Labor Management Relations Act. *See Prospect Dairy, Inc. v. Dellwood Dairy Co.*, 237 F.Supp. 176, 178-79 (N.D.N.Y.1964).

But accepting this explanation of *Moitie*, that case cannot confer federal jurisdiction here, because the plaintiffs have no "essentially federal" claim to recharacterize. Their claim rests on purported rights under a second mortgage and on transfers of property interests that allegedly abrogated those rights. This is a state law claim. The only federal element that plaintiffs could have pleaded is an anticipatory defense based upon the prior bankruptcy proceeding. To fall within footnote 2 of *Moitie*, the subsequent state claim must be "merely the same . . . claim in disguise." *Salveson v. Western States Bankcard Ass'n.*, 731 F.2d 1423, 1427 (9th Cir.1984) (characterizing lower court's finding in *Moitie*). The plaintiffs here are not recharacterizing any federal claim. Instead, the second mortgage they seek to enforce was never expunged from the local deed records after a bankruptcy court judgment commanded sale free and clear of all liens and encumbrances. Moreover, the plaintiffs are suing a successor in interest to the bankruptcy sale, not simply the original party to the proceeding in bankruptcy court. Also unlike *Moitie*, the plaintiffs here were not unsuccessful plaintiffs in the prior bankruptcy proceeding, but were defendants there. In every respect, these characteristics represent a more complex procedural scenario than did the *Moitie* plaintiff's copycat pleadings in federal and then state court.

Given my druthers, I would hold that the instant case is distinguishable from a narrow reading of *Moitie*. If, however, *Moitie* compels the result reached by the majority, then it appears significantly to have intruded into previously well-settled removal jurisprudence, whose anchor is the well-pleaded complaint rule. Consider this

hypothetical: A sues B in federal court on a federal securities claim and wins a judgment. B then sues A in state court on a contract claim that was arguably a compulsory counterclaim in the preceding litigation. Following *Moitie* as interpreted by *Rivet*, does the federal court have removal jurisdiction? If so, hasn't *Rivet* moved the boundaries of removal jurisdiction far away from *Moitie's* self-description as an "artful pleading" case?

The majority relies heavily on Judge Garwood's description of *Moitie* in the *Carpenter* decision. Notwithstanding *Carpenter's* statement that "we *hold* that *Moitie* should apply only where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law," 44 F.3d at 370 (emphasis added), *Carpenter's* statement is more *dicta* than holding. *Carpenter* was a very different case from *Moitie*. The defendants in *Carpenter* sought to rely on *Moitie* to prevent simultaneous litigation by a plaintiff in federal and state courts over the same grievance. Judge Garwood's extended, scholarly discussion of *Moitie* refused to adopt the proffered broad interpretation of *Moitie* that arguably would have prevented parallel litigation. As Judge Garwood put it, "whatever *Moitie* does mean, we are confident it does not mean so much." 44 F.3d at 368. The bulk of *Carpenter's* discussion explains why some circuit court cases have incorrectly construed *Moitie* to govern parallel litigation.[6] The *Carpenter* panel was not faced with anything like a plaintiff whose suit was in fact "completely precluded by a prior federal judgment on a question of

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[6] *See* 44 F.3d at 368-70, n. 6, n. 12 (disagreeing with the second circuit decision in *Travelers, supra*, n. 3)

federal law." This "holding" was merely a way to distinguish the cryptic *Moitie* footnote without "empty[ing] footnote 2 of all substantive content," and was surely not meant to broaden the *Moitie* decision's fleeting reference to the "federal character" of the plaintiff's claims into a completely new exception to the well-pleaded complaint rule. *See id.* at 370, n. 11.

In attempting to demonstrate that the factors relied upon by Judge Garwood in *Carpenter* to allow remand are not present here, the majority contends that "in this case we do have a prior federal judgment, we do have federal preclusion law to apply, and we have plaintiffs who have not taken any preclusion risks . . . but . . . are clearly seeking by collateral attack to avoid the preclusive effect of a prior federal judgment. . . . " Maj. Op. at 2355. I would hasten to add to that list what we also do not have in this case, but was essential in *Moitie* and obviously present in *Carpenter*: a conceivable federal claim that could be asserted by the plaintiff. The majority essentially holds that a *conceivable federal claim is not necessary for removal*, as long as there is a federal defense of res judicata based on a federal judgment. To say that a plaintiff's claim can be removed to federal court when he has alleged no conceivable federal claim is true mockery of the well-pleaded complaint rule and the artful pleading doctrine. How can the artful pleading doctrine apply if the plaintiff's claims can not be recharacterized into an essentially federal claim that has been omitted by artful pleading? *See Ultramar*, 900 F.2d at 1415 (" . . . recharacterization of purported state-law claims into federal claims was essential before removal could occur.").

Moreover, *Carpenter* expresses a fear of extending federal court removal jurisdiction that is realized in this case. Referring to the fact that plaintiff Carpenter could pursue litigation under theories of both federal and state constitutional law, Judge Garwood pithily observes, "we cannot say that the failure to make a state claim pendent makes it federal." *Id.* at 369. Here, whether we like it or not, and whether the plaintiffs proceeded in good faith or not, they have filed a claim that is based purely and solely on state law. It is not amenable to recharacterization as an "artful pleading" of a federal claim. In my view, *Carpenter* expressly decries the implication that this state-law claim must be removed to federal court according to a broad interpretation of *Moitie*.

Any reader who has followed the majority opinion and this dissent thus far ought to appreciate that our dispute, while technical, is not trivial.[7] The principles of limited federal court jurisdiction and the relative clarity of jurisdictional rules are at issue. *Moitie* and *Carpenter* can be read to authorize removal of this state-law-based case simply because it is subject to a federal preclusion

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[7] The majority's holding has another unfortunate consequence. Allowing federal jurisdiction to turn on whether the plaintiff's claims are barred by res judicata allows the defendant two bites at the apple: if upon the plaintiff's motion to remand the defendant loses the res judicata issue and the case is remanded, the defendant can relitigate the res judicata issue again in state court. The prior federal determination of the res judicata issue will not bind the state court, because, by virtue of the federal court's resolution of the res judicata issue, the federal court was not a court of proper jurisdiction. *See* Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L.J. 273, 311 (January 1993).

defense. But to do so, as I have shown, intrudes on the scope of the well-pleaded complaint rule, expanding federal removal jurisdiction while engendering complexity and uncertainty in the future. I do not believe such results were intended by the Supreme Court in *Moitie* or by the *Carpenter* panel; the best way to effectuate those decisions' narrowly tailored goals is to apply them narrowly and specifically. Because the majority opinion does not do so, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARY ANNA RIVET, MINNA REE WINER, EDMOND G. MIRANNE, AND EDMOND G. MIRANNE, JR. — CIVIL ACTION

VERSUS — NO. 95-0426

REGIONS BANK, WALTER L. BROWN, JR., PERRY S. BROWN, AND FOUNTAINBLEAU STORAGE ASSOCIATES — SECTION "A"

ORDER AND REASONS

This matter is before the Court on a Motion to Remand filed by plaintiffs Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr., and Motions for Summary Judgment filed by defendants Regions Bank, Walter L. Brown, Perry S. Brown, and Fountainbleau Storage Associates ("FSA"). Both motions were set for hearing on April 5, 1995, but were submitted on the briefs. For the reasons stated herein, plaintiffs, Motion to Remand is hereby DENIED and defendants' Motion for Summary Judgment is hereby GRANTED.

I. BACKGROUND

This suit concerns the vitality of a $5,000,000 collateral mortgage note secured by a collateral mortgage on certain real property located on Tulane Avenue in New Orleans, Louisiana. In 1957, Lois Stern executed a lease on the property in favor of Pelican State Hotel Corporation. The leasehold estate created by the lease was

acquired by Tulane Hotel Investors Limited Partnership ("THILP") on September 15, 1983. On the same date, THILP granted a first mortgage on the leasehold estate to secure a $15,000,000 collateral mortgage note pledged to First Financial Bank. On May 2, 1984, THILP granted a $5,000,000 second collateral mortgage (the "Second Mortgage") on the leasehold estate.[1] This Second Mortgage forms the basis of the present dispute.

THILP filed for Chapter 11 bankruptcy on October 5, 1984. The bankruptcy was later converted to a Chapter 7 proceeding and a trustee appointed.[2] The trustee applied for court approval to sell the leasehold estate at public auction free and clear of all liens including, specifically, the Second Mortgage. The bankruptcy court issued an order advising all creditors and parties in interest of the sale and setting a hearing on any objections for June 16, 1986. At the hearing, plaintiff Edmond G. Miranne, Jr. appeared on behalf of himself and his father, Edmond G. Miranne, Sr., as holders of the Second Mortgage. Their wives, plaintiffs Minna Lee [sic] Winer and Mary Anna Rivet, did not appear. On June 17, 1986, the bankruptcy court granted the sale application and ordered that the

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[1] For purposes of brevity, the Court will continue to refer to the "leasehold estate" as the prime subject of this dispute as it is uncontested that the plaintiffs' collateral mortgage burdened the leasehold estate. The Court's disposition of these motions moots defendants' alternate argument that plaintiffs' mortgage was extinguished by confusion, thereby removing any need to address plaintiffs' contention that the mortgage also attached to the buildings on the property as separate immovables.

[2] *See Matter of Tulane Hotel Investors Limited Partnership*, No. 84-02145-K, (Bankr.E.D.La. December 5, 1985).

sale be free and clear of all liens and encumbrances, including the Second Mortgage.

Pursuant to the bankruptcy court's June 17, 1986 order, the leasehold estate was sold at public auction to the first mortgage holder, First Financial Bank. On August 14, 1986, the bankruptcy court approved the auction results and issued an order directing sale of the property to First Financial Bank "free and clear of any and all liens and encumbrances" and specifically requiring cancellation of the Second Mortgage. Notwithstanding the terms of the bankruptcy court's order, the Second Mortgage was apparently never canceled and remains inscribed on the public records.

Secor Bank eventually succeeded First Financial Bank as owner of the leasehold estate. On December 29, 1993, defendants Walter S. Brown and Perry L. Brown sold the subject property to Secor, making Secor owner of both the property and the leasehold estate. On the same date Secor in turn conveyed its interest to FSA, the current owner.

Plaintiffs filed suit in state court alleging that the December 29, 1993 transactions violated their superior rights under the Second Mortgage. They sought payment of their secured debt and to have the Second Mortgage recognized and maintained against the property, or alternatively, damages. Defendants removed the suit to this Court, citing federal question jurisdiction in that the prior bankruptcy court orders extinguished the Second Mortgage. Plaintiffs filed a motion to remand, arguing that the prior bankruptcy court orders provide defendants with at most an affirmative defense insufficient to confer removal

jurisdiction. Defendants subsequently moved for summary judgment on grounds of *res judicata*, prescription, and confusion.

II. MOTION TO REMAND

The Fifth Circuit recently reiterated the principles governing federal question removal in *Carpenter v. Wichita Falls Independent School District*, 44 F.3d 362 (5th Cir. 1995). Generally, whether a cause of action presents a federal question for removal purposes depends upon the allegations of the plaintiff's well-pleaded complaint. *Id.* at 366. Accordingly, federal rights asserted by way of affirmative defense do not confer removal jurisdiction. However, the "artful pleading" doctrine, an exception to the "well-pleaded complaint" rule, provides that "where the plaintiff necessarily has available no legitimate or viable state cause of action, but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law." *Id.* In other words, plaintiff cannot avoid removal of a suit necessarily federal in character. *Id.* at 367.

In *Carpenter*, the Fifth Circuit specifically addressed the artful pleading doctrine in the context of *res judicata*, holding that a defendant may properly remove a purported state law cause of action which is "completely precluded by a prior federal judgment on a question of federal law." The Court's explanation is controlling here:

> [ ]Although we recognize that the state courts are able and required to apply federal rules of res judicata, *the federal law preclusive effect of the federal judgment could arguably be said*

to confer a federal character much the way complete preemption does. In both cases, federal law has in some sense extinguished the possibility of a state-court cause of action.

We also point out that the existence of a prior federal judgment lifts the statutory bar against enjoining an ongoing state proceeding. There is little practical distinction between, on the one hand, removing and dismissing a precluded state suit and, on the other hand, enjoining one. Under the relitigation exception to the Anti-Injunction Act, federal courts may enjoin state-court proceedings to protect prior federal judgments.

Id. at 370 (citations omitted and emphasis supplied). Thus under *Carpenter,* the propriety of removal in the present case hinges on whether the federal bankruptcy court's June 17, 1986 and August 14, 1986 orders preclude the plaintiffs' current attempt to enforce their mortgage.

Under the Fifth Circuit's formulation, *res judicata* bars a subsequent claim if: (1) the prior disposition was a final judgment on the merits rendered by a court of competent jurisdiction; (2) the parties are identical; and (3) the causes of action are the same. *Eubanks v. F.D.I.C.*, 977 F.2d 166, 169 (5th Cir. 1992); *Hendrick v. Avent*, 891 F.2d 583, 585 (5th Cir.), *cert. denied*, 498 U.S. 819 (1990). The present case satisfies all three elements of *res judicata*. It is undisputed that the bankruptcy court's August 14, 1986 Order approving the sale of the leasehold estate to First Financial constituted a final judgment rendered by a competent

court.[3] As to the identity of parties element, the Court notes that First Financial Bank was a party to the bankruptcy proceedings. As successors-in-interest to First Financial Bank, Regions Bank and FSA are bound by the bankruptcy court's orders in the same manner as their predecessor. *Meza v. General Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir. 1990). Although plaintiffs Rivet and Winer did not personally appear in the bankruptcy proceedings, the Fifth Circuit has held that a husband's participation in a bankruptcy proceeding binds a wife whose interests are closely aligned with and adequately represented by her husband. *Eubanks v. F.D.I.C.*, 977 F.2d 166 (5th Cir. 1992). Plaintiffs do not even attempt to argue, and indeed it seems wholly implausible, that the Mirannes represented only their own interests at the bankruptcy hearing and not also their wives' interests in preserving and enforcing the Second Mortgage.

Finally, the identity of claims element is satisfied because plaintiffs' claims both in this action and in the bankruptcy proceeding turn on the validity of the Second Mortgage which was determined by the bankruptcy court. Plaintiffs' argument that their cause of action arises solely from the December 29, 1993 transactions ignores

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[3] Plaintiffs' opposition memorandum asserts at some length various procedural misteps committed by the bankruptcy court in disposing of the leasehold estate, however these arguments are irrelevant as the exclusive mechanism for attacking an improvidently granted bankruptcy order is a timely appeal or request for reconsideration. *Matter of Aguilar*, 861 F.2d 873, 874 (5th Cir. 1988) (citing *Matter of Colley*, 814 F.2d 1008, 1010 (5th Cir.), *cert. denied*, 484 U.S. 898 (1987).

the fact that all of plaintiffs' claims depend on the existence of a valid and enforceable mortgage. Absent an enforceable mortgage, the December 29, 1993 transactions would not contravene any of plaintiffs' rights and would not be actionable.

Because all three elements of *res judicata* are met, the prior federal bankruptcy court order completely precludes plaintiffs' present cause of action, making removal to federal court proper under *Carpenter*. Plaintiffs argue that any theory of removal jurisdiction based on claim preclusion is necessarily limited by the Supreme Court's decision in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684 (1988) to those situations where the specific claims sought to be precluded were "actually litigated" in the prior proceeding. Even assuming that plaintiffs are correct as to the significance of *Chick Kam Choo* in this context, the Court finds that the "actually litigated" requirement was satisfied here. As previously discussed, the central issue underlying plaintiffs' cause of action is the validity of their Second Mortgage as determined by the bankruptcy court. Plaintiffs' charge that defendants fail to put forward any issue that was "actually litigated" in the prior bankruptcy proceeding ignores the whole focus of defendants' various memoranda, namely, that the validity of plaintiffs' Second Mortgage was necessarily decided once and for all as a precursor to authorizing the sale of the leasehold estate free and clear of all liens.[4]

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[4] The Court moreover refuses plaintiffs' invitation to elevate semantics over substance by demanding that defendants employ the totemic words "issue preclusion" rather than the traditional and still widely extant term "*res judicata*." *See e.g., U.S. v. Shanbaum*, 10 F.3d 305, 310-14 (5th Cir. 1994).

Finally, plaintiffs' reliance on *D-1 Enterprises, Inc. v. Commercial State Bank*, 864 F.2d 36 (5th Cir. 1989) is misplaced. In *D-1 Enterprises*, the Fifth Circuit refused to apply *res judicata* against counterclaims which were largely unrelated to and which could not have been raised in an earlier summary bankruptcy proceeding. Here on the other hand, plaintiffs' objections to the sale free and clear of their Second Mortgage could have and should have been raised before the bankruptcy court in connection with the trustee's motion to sell. Once the bankruptcy court's orders became final and the property was ordered sold free and clear of plaintiffs' Second Mortgage, all claims relating to the validity of the Second Mortgage were *res judicata*. Removal is thus authorized because the bankruptcy court's orders "extinguished the possibility of a state-court cause of action" to enforce plaintiffs' Second Mortgage. *See Carpenter*, 44 F.3d at 370.

III. MOTIONS FOR SUMMARY JUDGMENT

The Court's holding that the prior federal bankruptcy orders completely preclude plaintiffs' suit to enforce their Second Mortgage necessitates dismissal of plaintiffs' claims against Regions Bank and FSA. The Court's holding also moots plaintiffs' request for further discovery pursuant to Federal Rule of Civil Procedure 56(f), as none of the facts anticipated to be discovered by plaintiffs would mandate an alternate result on the dispositive

issue of preclusion. *See* Affidavit of John Gregory Odom Pursuant to Rule 56(f).

The final matter before the Court is the Motion for Summary Judgement filed by defendants Walter L. Brown, Jr. and Perry S. Brown. The basis of plaintiffs' claim is that the Browns "knowing[ly] participa[ted] in the series of transactions by which the Leasehold estate was cancelled [sic] and the separately owned buildings transferred in spite of the mortgage." *See* Memorandum in Opposition to Separate Motions for Summary Judgment at 14-15. However plaintiffs admit at page [sic][5] of their opposition memorandum that the Browns did *not* participate in the prior bankruptcy proceedings, and it is therefore difficult to see how the Browns can in any way be held responsible for plaintiffs' loss of rights pursuant to those proceedings. Moreover, plaintiffs themselves characterize their action as one *in rem*, which by definition is a claim against property, not against its former owners. The only case cited by plaintiffs in connection with their claim against the Browns, *In re Big Apple Scenic Studio, Inc.*, 63 B.R. 85 (Bkrtcy. S.D.N.Y. 1986), exhibits no relevance to the present case as it involved a Chapter 7 trustee's action to recover post-petition transfers. Finally, plaintiffs' nebulous allegation that "the Browns are proper parties herein because they are liable to plaintiffs under La. Civ. Code. art. 2315" fails to discharge plaintiffs' burden in opposing summary judgment. Plaintiffs have simply failed to establish any legal basis or any

[5] *See* Memorandum in Opposition to Separate Motions for Summary Judgment at 9.

triable issue of fact to support a claim against the Browns. Accordingly,

IT IS ORDERED that plaintiffs' motion to remand is hereby DENIED;

IT IS FURTHER ORDERED that the motions for summary judgment filed by defendants Regions Bank, Walter L. Brown, Jr., Perry S. Brown, and FSA are hereby GRANTED.

The Clerk of Court is hereby directed to enter judgment dismissing this suit in accordance herewith.

New Orleans, Louisiana, this 20th day of April, 1995.

/s/ Charles Schwartz, Jr.
UNITED STATES
DISTRICT JUDGE